First Impressions

The following pages contain brief summaries, drafted by the *Seton Hall Circuit Review* members, of issues of first impression identified by a federal court of appeals opinion between April 1, 2005 and August 31, 2005. This collection is organized by circuit.

Each summary presents the issue of first impression, a brief analysis and the court's conclusion. It is intended to give only the briefest synopsis of the first impression issue, not a comprehensive analysis. This compilation makes no claim to being exhaustive, but will hopefully serve the reader well as a reference starting point.

FEDERAL CIRCUIT

AT&T Corp. v. Microsoft Corp., 414 F.3d 1366 (Fed. Cir. 2005)

QUESTION: "[W]hether software replicated abroad from a master version exported from the United States—with the intent that it be

replicated—may be deemed 'supplied' from the United States for purposes of [patent infringement]." *Id*. at 1369.

ANALYSIS: In interpreting 35 U.S.C. § 271(f)(2005), a patent infringement statute attaching liability for supplying "in or from the United States all or substantial portion of the components of a patented invention" to "induce" the assembly of such components abroad, the Federal Circuit focused on congressional intent. *Id*. at 1371. The court stated, "Congress enacted § 271(f) in response to the Supreme Court's ruling in *Deepsouth Packing Co. v. Laitram Corp*., 406 U.S. 518 (1972) that exposed a loophole in § 271 that allowed potential infringers to avoid liability by manufacturing the components of patented products in the United States and then shipping them abroad for assembly." *Id*. Here, Microsoft did not export components of an invention; it sent abroad one master version of software for mass reproduction. *Id*. at 1369. The court held that § 271(f) must be interpreted broadly to cover Microsoft's actions because § 271(f) was enacted to expand § 271's scope to any situation where foreign infringement is accommodated by acts occurring within the United States. *Id*. 1371.

CONCLUSION: Thus, the court held, "For software 'components,' the act of copying is subsumed in the act of 'supplying,' such that sending a single copy abroad with the intent that it be replicated invokes 35 U.S.C. § 271(f) liability for those foreign made copies." *Id*. at 1370.

***Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005)**

QUESTION: Whether § 117(c) of the Copyright Act shields an entity from liability for copyright infringement when a copy of software onto RAM is necessary for a machine to function.

ANALYSIS: Although § 117(c) requires the immediate destruction of the copy made after "maintenance or repair" is completed, the term "maintenance" as defined in § 117(d) implies an ongoing process. *Id*. at 1312. Thus, although a company may continually work with a system, it need not reboot and destroy the copy made until its maintenance contract has lapsed. *Id*. at 1312-13. Further, the copy is only allowed to be made if it is necessary for the machine to be turned on. *Id*. at 1314. If code designed for maintenance is so entangled with functional code, its copying is permitted by § 117(c). *Id*. at 1314.

CONCLUSION: § 117(c) of the Copyright Act shields an entity from liability for copyright infringement when a copy of the software is made for maintenance purposes. *See id*. at 1312-15.

***Wilson ex rel. Estate of Wilson v. United States*, 405 F.3d 1002 (Fed. Cir. 2005)**

QUESTION: Whether defendant has jurisdiction to bring a claim in the United States Court of Federal Claims to recover payment made to Medicare on the grounds that the government's claim against the estate was an illegal exaction.

ANALYSIS: The court first noted that, although the Tucker Act allows a person to pursue a claim in the Court of Federal Claims for the recovery of monies paid to the government on the grounds that it was improperly paid, an illegal exaction claim may not be brought in the Court of Federal Claims under the Tucker Act "when 'Congress has expressly placed jurisdiction elsewhere.'" *Id.* at 1009 (quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996)). The court stated that "'all aspects of . . . claim[s] for benefits should be channeled first into the administrative process which Congress has provided for the determination of claims for benefits.'" *Id*. at 1012 (quoting *Heckler v. Ringer*, 466 U.S. 602, 605 (1984)). The court held that defendant's claim is a benefits claim since she is effectively demanding recovery of an overpayment of benefits by Medicare and, therefore, the claim arises under the Medicare Act. *Id.* at 1013. The court noted consistencies in its ruling with two circuits. *Id.* at 1013-16.

CONCLUSION: The court held that the claim of illegal exaction was a benefits claim and, as such, arose under the Medicare Act, which required defendant to pursue the claim under the administrative and judicial channels of the Act.

***Pacific Gas & Elec. Co. v. United States*, 417 F.3d 1375 (Fed. Cir. 1995)**

QUESTION: "Whether the IRS was entitled to offset the erroneous interest paid to PG&E in 1988 against amounts due and owing PG&E on a subsequent refund relating to the same tax year when the government could not have maintained a suit for such erroneous interest due to the expiration of the statute of limitations." *Id.* at 1378.

ANALYSIS: The court noted that a "tax deficiency, tax penalty, and deficiency interest . . . are all components of a taxpayer's liability." *Id.* at 1382. "Therefore, these components are taken into account in determining whether an overpayment exists and permitting them to offset a claimed refund is logical." *Id.* at 1383. However, "[s]tatutory interest is [not] a part of, or even related to a taxpayer's tax liability." *Id*. Significantly, the "tax code provides an integrated and comprehensive scheme for assessing, collecting, and refunding taxes, deficiency interest,

and penalties." The court then stated that to permit an offset under these circumstances would go outside "this well-tailored statutory scheme." *Id*.

CONCLUSION: Ultimately, the court held that the "Service's ability to offset erroneously paid statutory interest against a taxpayer's refund claim in the same tax year is subject to the same statute of limitations that applies to suits by the United States to recover refunds of taxes or erroneous payments." *Id.* at 1384.

Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347 (Fed. Cir. 2005)

QUESTION: Should a statute, which prohibits the marking of an unpatented product with the word "patent" for the purpose of deceiving the public, be interpreted as a strict liability statute requiring "all actual mismarking[s] to be subject to . . . [a] civil fine?" *Id*. at 1352.

ANALYSIS: The court noted that the precedent of other circuits supported a finding that "where one 'has an honest, though mistaken, belief that upon a proper construction it covers the article which he marks,' the requisite intent to deceive the public would not be shown." *Id*.

CONCLUSION: Being that the statute itself called for the intent to deceive and that there were objective criteria in place for a court to find such intent, and based on the precedent of other circuits, the Federal Circuit held that the statute required a plaintiff to show "by a preponderance of the evidence that the party accused of false marking did not have a reasonable belief that the articles were properly marked." *Id*.

Harris Corp. v. Ericsson, Inc., 417 F.3d 1241 (Fed. Cir. 2005)

QUESTION: Whether "it is permissible to use a blended royalty rate when all of the infringement for which damages are available took place after the lower rate would come into effect." *Id.* at 1257.

ANALYSIS: Relying on the court's reasoning in *Wang Laboratories v. Toshiba Corp.*, 993 F.2d 858 (Fed. Cir. 1993), Harris argued that royalty rates used to establish damages are tied to the first date of infringement regardless of subsequent events. *Id.* Therefore, where the first infringement occurred in January 1992, the statutory damages period in which damages were available began and the royalty rates applicable in 1992 should be used to calculate damages. *Id.* On the other hand, Ericsson argued that under *Wang* the court could rely on subsequent events to the first infringement in determining the royalty rates used to

calculate damages. *Id.* Therefore, where Ericsson received notice of the patent in August 1998, the statutory damages period in which damages were available did not begin until August 1998, and the low royalty rate should apply. *Id.*

CONCLUSION: The Federal Circuit held that the district court correctly understood that *Wang* allowed for consideration of subsequent events, but was in error where it blended the royalty rate applicable during 1992-1997 and the low royalty rate applicable beginning in January 1997 to calculate damages. *Id.* The rate to apply is the one that would have been in effect during the period in which damages were available. *Id.* at 1258. In this case, damages would not have been available until August 1998, in which the low rate applied. *Id.* at 1258.

Britton v. Office of Compliance, 412 F.3d 1324 (Fed. Cir. 2005)

QUESTION: "[W]hether 2 U.S.C. § 1406(a) and section 1.03 of the Office of Compliance's Rules of Procedure mean that the thirty-day time limit for petitions for review of decisions of the Hearing Officer is measured from the date of entry of the decision or from the date the petitioner receives the decision." *Id.* at 1328.

ANALYSIS: The court, agreeing with the defendant Board, explained that "§ 1406(a) requires a petition for review to be filed a maximum of thirty days from 'the date that the hearing officer's decision is entered into the Office's record' not the date of 'the service of a mailed notice or document on a person or party.' By its clear language, section 1.03(c)'s extensions of time apply to a different class of deadlines – those based on a party's receipt of a document. They plainly do not . . . apply to 'every prescribed period set forth in the statute and Procedural Rules.' Furthermore, although the immediately preceding section 1.03(b) applies to 'any action required or permitted under these rules,' the Rules contain no suggestion that section 1.03(c) has the same scope." *Id.* at 1330.

CONCLUSION: The court agreed with the Board's interpretation of the applicable law and its resulting conclusion. Thus, it affirmed the Board's dismissal. *Id.*

NTP, Inc. v. Research in Motion, LTD., 418 F.3d 1282 (Fed. Cir. 2005)

QUESTION: Whether a sale of a patent-infringing method can occur in the United States, even if the actual method occurs outside the United States. *Id*. at 1318.

ANALYSIS: Research in Motion (RIM), makers of the Blackberry wireless email device, were sued for patent infringement by NTP, Inc., who patented the first wireless email system. *Id*. at 1288-89. NTP claimed under § 271(a) of the Patent Act that RIM's use of a wireless email system infringed on its method patent, but the Federal Circuit reasoned that because RIM was located in Canada, the use of the method was beyond the reach of § 271(a). *Id*. at 1318.

NTP then claimed that the sale of that method within the United States was enough, even though the method itself was beyond the Act's reach. *Id*. The Federal Circuit disagreed because Congress intended that method claims could only be infringed by use, not sales. However the court limited its holding to the facts of the case stating "we need not and do not hold that method claims may not be infringed under the 'sells' and offers to sell' prongs of section 271(a)." *Id*. at 1320-21.

CONCLUSION: RIM's use of a patented method as a service to its customers cannot be considered selling of the method under §271(a). *Id*. at 1321.

D.C. CIRCUIT

Goldring v. Dist. of Columbia, 416 F.3d 70 (D.C. Cir. 2005)

QUESTION: Whether the Individuals with Disabilities Education Act's ("IDEA") "fee-shifting provision enables a prevailing party to recover expert fees as part of his costs . . . ." *Id*. at 73.

ANALYSIS: Parents of disabled children sued the District of Columbia Public Schools for violations of IDEA. *Id*. at 71. After being granted summary judgment, plaintiffs appealed in order to recover the costs of obtaining experts under § 1415, which allows the recovery of "reasonable attorney's fees." *Id*. The D.C. Circuit quoted the Supreme Court decision *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987), which found that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [section] 1821(b), absent contract or explicit statutory authority to the contrary." *Id*. at 72. Analogizing *Crawford*, the D.C. Circuit found that there was no "explicit statutory authority" in the IDEA to lead to the conclusion that expert fees were recoverable costs. *Id*. at 73.

CONCLUSION: The IDEA's fee-shifting provision does not allow the prevailing party to recover expert fees as part of the award of attorneys' fees. *Id*. at 71.

***Booker v. Robert Half Int'l.*, 413 F.3d 77 (D.C. Cir. 2005)**

QUESTION: Whether "enforcing the remainder of [an] arbitration clause contravenes the federal policy interest in ensuring the effective vindication of statutory rights" when the arbitration agreement contains a provision that "requires the claimant to forgo substantive rights." *Id.* at 79.

ANALYSIS: Booker claimed that "responding to illegal provisions in arbitration agreements by judicially pruning them out leaves employers with every incentive to 'overreach' when drafting such agreements." *Id.* at 84. The D.C. Circuit found that "[i]f illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts . . . the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Id.* at 84-85. In addition, the court stated, "the more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the clause, a dynamic that creates incentives against the very overreaching Booker fears." *Id.* at 85. "Not only does the agreement [under review] contain a severability clause, but Booker identifies only one discrete illegal provision in the agreement." *Id.*

CONCLUSION: The D.C. Circuit concluded that "[t]he existence of an express severability clause in the agreement, the fact that the agreement is otherwise valid and enforceable, and a 'healthy regard for the federal policy favoring arbitration,' lead us to affirm the decision below, severing the ban on punitive damages and compelling arbitration." *Id.* at 79.

FIRST CIRCUIT

***United States v. Alvarez-Cuevas*, 415 F.3d 121 (1st Cir. 2005)**

QUESTION: "[W]hether the enhancement in [USSG] § 2A4.1(b)(6) applies when a fellow conspirator in the hostage taking has retained the taken child in his or her custody and the consideration received is no more than the conspirator's expected share of the ransom." *Id.* at 122.

ANALYSIS: The 1st Circuit looked to the legislative history of the statute and found that the enhancement was "geared to the crime of kidnapping, not hostage taking." *Id.* at 125-26. Additionally, the court reasoned that the enhancement "most easily fits a kidnap-for-hire situation," where the kidnapper "never intends to return the child to her original home." *Id.* at 126. Finally, the court found that an interpretation that would enhance the sentence of criminals, like the defendant, would

create an "incentive for kidnappers to hide or even to abandon children" to avoid the enhancement. *Id.* at 127.

CONCLUSION: The 1st Circuit found that the enhancement in USSG § 2A4.1(b)(6) is not applicable "when a fellow conspirator in the hostage taking has retained the taken child in his or her custody and the consideration received is no more than the conspirator's expected share of the ransom." *Id.* at 122.

United States v. Lawlor, 406 F.3d 37 (1st Cir. 2005)

QUESTION: Whether a state trooper's protective sweep of defendant's house which was incident to his arrest immediately outside defendant's house was reasonable under the Fourth Amendment.

ANALYSIS: The 1st Circuit followed the Supreme Court's decision in *Maryland v. Buie*, which held that an exception to the general rule that a search must be reasonable under the Fourth Amendment exists where "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id*. at 41 (quoting *Maryalnd v. Buie*, 494 U.S. 325, 334 (1990)). Additionally, the search must be limited to ''a cursory inspection of those spaces where a person may be found.'' *Id*. (quoting *Buie,* 494 U.S. at 335). The court noted that *Buie* placed significance on "the risk of danger in the context of an arrest in the home" due to the possibility of third parties in the home. *Id*. (quoting *Buie,* 494 U.S. at 336). Accordingly, the court determined that an arrest immediately outside the home can pose the same threat. *Id.* Therefore, the court held that the officer's entry and search of the home were cursory and reasonable under the circumstances of this case. *Id.* at 42. The court acknowledged that other circuits have allowed protective sweeps to be made in this fashion. *Id.*

CONCLUSION: The protective sweep of defendant's house was lawful under the Fourth Amendment since there existed the danger of a third person in the house and the search was cursory.

In re *Gitto Global Corp.*, 422 F.3d 1 (1st Cir. 2005)

QUESTION: The issue facing the court was the proper and precise scope of 11 U.S.C. § 107(b)(2), "which provides an exception to the rule of public access to papers filed in a bankruptcy case for material that is 'scandalous or defamatory'" *Id.* at 1.

ANALYSIS: The 1st Circuit began by noting that § 107 "establishes a broad right of public access, subject only to limited exceptions set forth in the statute, to all papers filed in a bankruptcy case." *Id.* at 3. In attempting to define "defamatory matter[s]," the court found the face of the statute and its legislative history failed to provide a sufficient definition, leaving the court "to determine the specific contours of the exception." *Id.* at 11. In furtherance of the policy of § 107(a), the court held that "a party may seek protection under § 107(b)(2) based on *potentially* untrue information that would alter his reputation in the eyes of a reasonable person." *Id.* at 12. Turning to "case law and . . . interpretation[s] of sources analogous to § 107(b)(2)," the 1st Circuit went on to find that protection could only be *granted* where it can be shown that the "information would . . . be irrelevant [or] included for improper ends." *Id.* at 13-14.

CONCLUSION: "To qualify for protection under the § 107(b)(2) exception for defamatory material, an interested party must show (1) that the material at issue would alter his reputation in the eyes of a reasonable person, and (2) that the material is untrue or that it is potentially untrue and irrelevant or included for an improper end." *Id.* at 16.

***Belini v. Wash. Mut. Bank*, 412 F.3d 17 (1st Cir. 2005)**

QUESTION: "[W]hether TILA [the Truth in Lending Act] permits a damages claim to be stated by the debtor under 15 U.S.C. § 1640 based on the creditor's alleged failure to respond properly to the debtor's notice of rescission." *Id*. at 19.

ANALYSIS: The 1st Circuit reviewed the relevant provisions of TILA as well as the purpose of that statute. TILA primarily requires disclosure. *Id*. at 25. Although rescission is not a remedy for a TILA violation, it may be sought in an action along with actual damages and the statutory penalty. *Id*. at 24, n.2. If a creditor has not disclosed necessary information, after the receipt of a valid notice of recission, that creditor has violated a disclosure requirement of TILA and is liable for damages pursuant to § 1640. *Id*. at 25. Furthermore, rescission is meant to be a private process. *Id*. "The potential for damages (including penalties and attorney's fees) creates incentives for creditors to rescind mortgages when faced with valid requests without forcing debtors to resort to the courts, for such resort causes substantial delay and expense to debtors." *Id*.

CONCLUSION: The 1st Circuit concluded that TILA does permit a damages claim under § 1640 based on the creditor's alleged failure to respond properly to the debtor's notice of rescission. *Id*. at 19.

***United States v. Vazquez-Rivera,* 407 F.3d 476 (1st Cir. 2005)**

QUESTION: When a court violates a criminal defendant's Sixth Amendment rights through the mandatory application of the Federal Sentencing Guidelines, is the proper remedy: (1) to remand for re-sentencing, or (2) to solicit an advisory opinion from the judge in error regarding whether or not the judge's mistaken belief about the mandatory application of the Guidelines affected the sentence the judge otherwise would have given to the defendant? *Id*. at 490

ANALYSIS: In *United States v. Booker*, 125 S.Ct. 738 (2005), the Supreme Court held in part that the imposition of a mandatory Federal Guidelines sentence made "on the basis of judge-found facts" was unconstitutional as a violation of a criminal defendant's Sixth Amendment rights. *Id*. at 489. The 1st Circuit held that these cases are to be remanded for re-sentencing, so long as the government is unable to meet its burden showing that the error "did not affect the defendant's substantial rights" beyond a reasonable doubt. *Id*.

CONCLUSION: The 1st Circuit concluded that defendant's constitutional rights had been violated and that the government had not demonstrated beyond a reasonable doubt that this error did not affect defendant's substantial rights. *Id*. at 491. The court then remanded for re-sentencing rather than following the advisory approached based on the court's belief that there would not "be so many such cases that reconvening sentencing hearing will create a significant administrative burden." *Id*.

***El Dia, Inc. v. P.R. Dep't of Consumer Affairs*, 413 F.3d 110 (1st Cir. 2005)**

QUESTION: Whether a bond requirement for nonresident advertisers is a valid restriction on commercial speech under the 1st Amendment. *Id*. at 114.

ANALYSIS: Dismissing other cases, the 1st Circuit stated that the framework set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), is the proper test to use when determining whether the bond requirements for nonresident advertisers impermissibly violates the advertiser's First Amendment rights. *Id*. at 114. The 1st Circuit found that the Puerto Rico bond requirement fails the second and third prongs of the *Central Hudson* test. *Id*. at 115. The second prong states, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real

and that its restrictions will in fact alleviate them to a material degree." *Id*. at 115 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)). The bond requirement also failed the third prong which requires that the "'speech restrictions be narrowly drawn.'" *Id*. at 117 (quoting *Central Hudson*, 447 U.S. at 565).

CONCLUSION: Under the test set forth in *Central Hudson*, a bond requirement restricting an advertiser's commercial speech must 1) demonstrate that harms are real, 2) show that the restrictions will lessen those harms and 3) be narrowly tailored. In this case the bond requirement failed. *Id*. at 117-18.

***United States v. Work*, 409 F.3d 484 (1st Cir. 2005)**

QUESTION: "Whether the combined sentence of years of imprisonment plus years of supervised release may exceed the statutory maximum number of years of imprisonment authorized by the substantive statute applicable to the crime of conviction." *Id*. at 489.

ANALYSIS: The 1st Circuit explained that a "sentence" in a broad sense of the term consists of several parts, including incarceration, fines, term of supervised release, or special monetary assessment. *Id*. Each part of the "sentence" is evaluated separately; therefore, the aggregate time in which the sentence is imposed on the guilty party may exceed the maximum number of years authorized for imprisonment. *Id*. The court followed the 2nd, 4th, 5th, 8th, 9th, and 10th Circuits in this holding. *Id*. at 489-90. The 1st Circuit stated that "the permissible term of incarceration authorized for a supervised release violation is not circumscribed by the substantive sentence called for under the federal guidelines," and therefore the sentence is upheld. *Id*. at 490.

CONCLUSION: "When determining whether a sentence exceeds the maximum permissible under the Constitution, each aspect of the sentence must be analyzed separately." *Id*. at 490.

***McBee v. Delica Co., Ltd.*, 417 F.3d 107 (1st Cir. 2005)**

QUESTION: When is it proper to apply the Lanham Act extraterritorially? *Id.* at 110.

ANALYSIS: "Congress has little reason to assert jurisdiction over foreign defendants who are engaging in activities that have no substantial effect on the United States, and courts, absent an express statement from Congress, have no good reason to go further in such situations." *Id.* at 120. "[W]e first ask whether the defendant is an American citizen, and if he is not, then we use the substantial effects test as the sole touchstone to

determine jurisdiction." *Id.* at 121. "The substantial effects test requires that there be evidence of impacts within the United States, and these impacts must be of a sufficient character and magnitude to give the United States a reasonably strong interest in the litigation." *Id.* at 120.

CONCLUSION: "We hold that the Lanham Act grants subject matter jurisdiction over extraterritorial conduct by foreign defendants only where the conduct has a substantial effect on United States commerce. Absent a showing of such a substantial effect, at least as to foreign defendants, the court lacks jurisdiction over the Lanham Act claim." *Id.* at 120.

SECOND CIRCUIT

United States v. Perez, 414 F.3d 302 (2d Cir. 2005)

QUESTION: "[W]hether a defendant can be convicted of using a facility in interstate commerce with the intent that a murder-for-hire be committed when the defendant's usage of that facility is wholly *intrastate*." *Id*. at 303.

ANALYSIS: The court pointed out that circuits are split on whether "the actual use by the defendant must be an interstate one" to support a finding that he violated 18 U.S.C. § 1958(b)(2005) by "using a facility of interstate commerce" to commit murder-for-hire. *Id*. at 303-304. The court noted that the 5th and 7th Circuits hold that the statute is satisfied "irrespective of whether the particular usage in question was itself *interstate* or *intrastate*, so long as the facility is one involved in interstate commerce." *Id*. at 304. On the other hand, the court pointed out that the 6th Circuit held that an intrastate usage does not establish jurisdiction even where the facility used is an interstate one. *Id*. The court found the 5th and 7th Circuits' approach more consistent with the statutory language. *Id*.

CONCLUSION: The court concluded that a defendant can be convicted under § 1958(b) for using an interstate commerce facility to commit murder-for-hire in a totally intrastate fashion. *See id*. at 305.

Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir. 2005)

QUESTION: "[W]hether the [National Bank Act] NBA and [the Office of the Comptroller of the Currency] OCC regulations preempt state banking laws concerning operating subsidiaries of nationally chartered banks." *Id* at 309.

ANALYSIS: "The NBA grants powers to national banks, including 'incidental powers' necessary to carry on the business of banking . . . and it provides that national banks, in the exercise of their powers, shall be free from state 'visitorial' power . . . . The OCC, meanwhile, has issued regulations allowing national banks to conduct business through an operating subsidiary . . . and providing that 'State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank . . . .' These regulations define a national bank's 'incidental powers' to include conducting business through an operating subsidiary, and they preempt state visitorial power over operating subsidiaries to enable national banks to exercise this incidental power." *Id*.

CONCLUSION: The court held that the NBA and OCC preempt state banking laws in this context and that the court will "defer to these regulations because they are reasonable within the OCC's authority under the NBA." *Id*.

***United States v. Jones*, 415 F.3d 256 (2d Cir. 2005)**

QUESTION: Whether a defendant's state youthful offender adjudications can be used in determining whether the defendant is a Career Offender under the United States Sentencing Guidelines, U.S.S.G. § 3B1.1. *Id.* at 258

ANALYSIS: The 2nd Circuit stated that "a defendant will be considered a 'Career Offender' under the Guidelines if the following three prongs are satisfied." *Id.* at 260. First, was the defendant "at least eighteen years old at the time the defendant committed the instant offense of conviction?" *Id*. Second, was "the instant offense of conviction" a "felony that is either a crime of violence or a controlled substance offense?" *Id.* Third, does the defendant have "at least two prior felony convictions of either a crime of violence or a controlled substance offense." *Id.*

The court defined a "prior felony conviction" as being "a prior *adult* federal or state conviction for an offense punishable by . . . imprisonment for a term exceeding one year." *Id.* at 260-61. A conviction occurring before the age of eighteen can be deemed an adult conviction "if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted." *Id.* at 261. The court also stated that "a federal sentencing court can consider youthful offender adjudications" in its deliberations for sentencing. *Id*.

CONCLUSION: Ultimately, the court determined that it is proper to use youthful offender adjudications in determining the Career Offender status of the defendant. *Id*. at 256.

***Sepulveda v. Gonzalez*, 407 F.3d 59 (2d Cir. 2005)**

QUESTION: Whether 8 U.S.C. § 1252(a)(2)(B)(i) bars the courts of appeals from reviewing orders from the Board of Immigration Appeals that denied a motion to reopen petitioner's removal proceedings and an order which denied a motion to reconsider that order.

ANALYSIS: The court introduced the plain language of 8 U.S.C. § 1252(a)(2)(B) (1996), which provides that ''no court shall have jurisdiction to review any judgment regarding the granting of relief under section[s] . . . of this title.'' *Id.* at 62 (quoting 8 U.S.C. § 1252(a)(2)(B)(i)). Despite the plain language, the court relied on precedent demonstrating the "'strong presumption in favor of judicial review of administrative action.'" *Id.* (quoting *I.N.S. v. St. Cyr.*, 533 U.S. 289, 298 (2001)). The court also noted that its decision followed that of other circuits which similarly held that the statute does not bar judicial review. *Id.* at 63. Finally, the court followed a principal that "because a final order of removal is intertwined with subsequent motions to reconsider and reopen those removal proceedings, a jurisdictional provision that applies to a final order of removal necessarily [] applies to related motions to reconsider and reopen." *Id.* at 64. Accordingly, the court held that judicial review of these orders was proper. *Id.*

CONCLUSION: The court held that "8 U.S.C. § 1252(a)(2)(B)(i) does not prohibit [the] [c]ourt from reviewing [the] orders because the determinations to deny [petitioner] eligibility for relief under §§ 1229b and 1255(i) were nondiscretionary." *Id.* at 61.

In re *Luna*, 406 F.3d 1192 (2d. Cir. 2005)

QUESTION: "Whether unpaid contributions are 'assets' of an ERISA plan." *Id.* at 1198.

ANALYSIS: The court first looked at the plain meaning of the word "asset" which revealed that the central point of the definition is that "the person or entity holding the asset has an ownership interest in a given thing, whether tangible or intangible." *Id*. at 1199. Next, in determining ownership interests, the court looked at common law property principles and held that a future interest exists in the plan "in the collection of the contractually-owed contributions." *Id.* Under the First Restatement, "a future interest in property is "'an interest . . . which is not, but may

become a present interest.'" *Id*. (quoting Restatement (First) of Property § 153(1)(a) (1936)). In this particular case, the court held that the contractual interest to collect the unpaid contributions represents a future interest in the plan and, by application of the Restatement, qualifies as a present interest. *Id*. Therefore, the unpaid contributions are "assets" of the ERISA plan. *Id.*

CONCLUSION: The court held that the contractual right to collect unpaid contributions represents a present interest in the plan and, therefore, qualifies as an "asset" of an ERISA plan.

In re *Siemon*, 421 F.3d 167 (2d Cir. 2005)

QUESTION: "[W]hether the time limit imposed by Rule 8002(a) [of the Federal Rules of Bankruptcy Procedure] is in fact jurisdictional . . . ." *Id.* at 169.

ANALYSIS: Answering in the affirmative, the 2nd Circuit cited three reasons in support of its decision. First, the court pointed to a number of district court cases that had treated the rule as jurisdictional. *Id.* Second, the court cited sister courts that had come to the same determination. *Id.* Finally, the court noted that "[t]he advisory committee's note to Rule 8002(a) states that the rule is an 'adaptation' of Rule 4(a) of the Federal Rules of Appellate Procedure [and that] it is . . . well established that the time limit prescribed by [Rule] 4(a) is 'mandatory and jurisdictional.'" *Id.* (citations omitted).

CONCLUSION: Ultimately, the court followed its "sister circuits in holding that the time limit contained in Rule 8002(a) is jurisdictional, and that, in the absence of a timely notice of appeal in the district court, the district court is without jurisdiction to consider the appeal, regardless of whether the appellant can demonstrate 'excusable neglect.'" *Id.*

***Cross v. New York City Transit Auth.*, 417 F.3d 241 (2d Cir. 2005)**

QUESTION: "[W]hether public employers are exempt from the liquidated damages provision of the ADEA [Age Discrimination in Employment Act]." *Id.* at 254.

ANALYSIS: The court followed the 3rd Circuit reasoning on this issue by noting that "the ADEA makes it unlawful for an employer 'to fail or refuse to hire or to discharge' an individual because of his or her age." *Id.* at 255. The court found that "[b]ecause state and municipal entities are expressly included within the ADEA definition of an 'employer,'… the statute 'could not be more explicit in imposing

liability for age discrimination against municipalities' and agencies thereof." *Id.*

CONCLUSION: The court concluded "that the plaintiffs have a right to recover liquidated damages for this willful discrimination from the Transit Authority because the ADEA authorizes such damages against public as well as private employers." *Id.* at 259.

605 Park Garage Assoc., LLC v. 605 Apartment Corp., 412 F.3d 304 (2d Cir. 2005)

QUESTION: "[W]hether a cooperative may terminate a lease entered into by a sponsor (or its affiliate) prior to the [the Condominium and Cooperative Conversion Protection and Abuse] Relief Act's effective date, where two lease renewal options contained in that lease were exercised after the Act's effective date." *Id.* at 305.

ANALYSIS: The court found that "[s]ince the exercise of a lease renewal option does not create a new lease under New York law, and since the Garage Lease was executed before October 8, 1980, the plain language of the Relief Act dictates that the Garage Lease may not be terminated under that Act." *Id*. at 306. "Moreover, application of the Relief Act in the manner the Cooperative urges would implicate retroactivity concerns." *Id*. (citation omitted).

CONCLUSION: The court asserted that "federal courts will apply a statute retroactively only where provided with a clear articulation of congressional intent, which is lacking here." *Id.* (citation omitted). Thus, the court held that the Relief Act provided no such termination right and affirmed the district court's ruling in favor of the sponsor. *Id.* at 305-06.

United States v. Weisser, 417 F.3d 336 (2d Cir. 2005)

QUESTION: Whether § 2G2.2 of the United States Sentencing Guidelines, providing for a computer-use enhancement if "a computer was used for the transmission of the material," applies to an individual whose act of transporting for which he has been convicted entails physically carrying a CD from one state to another, "an act that concededly [does] not involve the use of a computer." *Id.* at 349.

ANALYSIS: Finding a recent 3rd Circuit ruling on this issue persuasive, the 2nd Circuit agreed with the 3rd Circuit's assertion that "[t]he language of § 2G2.2(b)(5) is specifically targeted toward 'the material' and not 'the offense,' as are other portions of § 2G2.2. The application of the enhancement, therefore, does not hinge on whether the defendant used a computer to commit 'the offense' for which he was

convicted. Instead, the enhancement hinges on 'the material' implicated in the offense, and whether this material had at some point been transmitted using a computer." *Id.* (quoting *United States v. Harrison*, 357 F.3d 314 (3d Cir. 2004)). The court also found that policy reasons strongly favor application of the enhancement. *Id.* The court articulated that "[a]pplication of the enhancement where a computer was used in transmitting the pornographic materials underlying the offense . . . serves to punish more severely what has been recognized as more dangerous behavior." *Id.*

CONCLUSION: Accordingly, the court found that the lower court had properly applied § 2G2.2 "to the act of transporting a CD whose manner of creation – downloading – involved 'use of a computer.'" *Id.*

***United States v. Amante*, 418 F.3d 220 (2d Cir. 2005)**

QUESTION: "[W]hether a district court may bifurcate a single-count felon-in-possession trial absent the government's consent." *Id.* at 222.

ANALYSIS: The court reasoned that a "bifurcation order…presents the problem of forcing the jury to deliberate about the issue of ammunition possession without knowing that the charged crime requires a prior felony." *Id*. at 224. In addition, the 1st, 4th, and 9th Circuits have prohibited trial courts from bifurcating the elements of a single-count felon-in-possession at trial. *Id.* at 223-24.

CONCLUSION: "[W]e hold that bifurcation of the elements of a single-count felon-in-possession trial, absent the government's consent, is generally error." *Id.* at 224.

***Vacchio v. Ashcroft*, 404 F.3d 663 (2d Cir. 2005)**

QUESTION: In cases brought under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, "whether a petition for a writ of habeas corpus challenging an immigration detention qualifies as a 'civil action.'" *Id*. at 664.

ANALYSIS: In *Boudin v. Thomas*, 732 F.2d 1107 (2d. Cir. 1984), the 2nd Circuit had held that habeas petitions did not qualify as a "civil action" under the EAJA. *Id*. at 667. The 2nd Circuit had recognized that in enacting the EAJA, Congress was concerned where "the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy." *Id*. at 669-670 (internal citations omitted). However, immigration habeas challenges can be distinguished in part because "unlike criminal defendants, persons in immigration proceedings are not provided with

legal counsel." *Id*. at 670. Finally, "the EAJA's purpose of providing financial encouragement to litigants is not sufficient to demonstrate that Congress's intent was to exclude habeas petitions in the immigration context from the term 'civil action[s].'" *Id*. at 671.

CONCLUSION: The court found that "a habeas proceeding challenging immigration detentions constitutes a "civil action" under the EAJA." *Id*. at 672.

In re *Simon II Litigation*, 407 F.3d 125 (2d Cir. 2005)

QUESTION: Whether a court may certify "a mandatory, stand-alone punitive damages class on the proposed 'limited punishment' theory" *Id*. at 132.

ANALYSIS: The limited punishment theory is premised on the idea that "there is a constitutional due process limitation on the total amount of punitive damages that may be assessed against a defendant for the same offending conduct." *Id*. at 134. It is the Due Process Clause of the Fourteenth Amendment which supplies this cap by prohibiting the "'imposition of grossly excessive or arbitrary punishments on a tortfeasor.'" *Id*. at 135. Theory aside, the 2nd Circuit noted that there are definite conditions that must be satisfied in order to justify binding absent class members. *Id*. at 137. The court stated that these conditions were: "'a fund with a definitely ascertainable limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution.'" *Id*.

CONCLUSION: Since the proposed cap under the 'limited punishment' theory was merely theoretical, capped by the uncertain boundaries of the Fourteenth Amendment Due Process Clause, the court held that the amount of the fund under such a theory was not definitely ascertainable; and thus, the theory could not be used by a court to certify a mandatory punitive damages class. *Id*. at 138-40.

***Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506 (2d Cir. 2005)**

QUESTION: Whether there is an exception to the rule that an action sought to be enjoined is moot if the event at issue occurs. *Id*. at 509.

ANALYSIS: The 2nd Circuit explained that normally "the occurrence of an action sought to be enjoined . . . moots the request for preliminary injunctive relief because [the] Court has 'no effective relief to offer' once the action has occurred." *Id*. (quoting *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 48 F.3d 618, 621 (1st Cir. 1995)). However, the court stated that if there is a situation in which the court

can still grant effective relief by placing the parties back in the same situation that they were in before the action occurred, the case is no longer moot. *Id.* at 510.

CONCLUSION: If effective relief can still be granted by returning the parties to the status quo before the action occurred then the case is not moot and the court still has jurisdiction. *Id*.

***Lin v. U.S. Dept. of Justice*, 416 F.3d 184 (2d Cir. 2005)**

QUESTION: Whether an Immigration Judge's interpretation of the Immigration and Naturalization Act ("INA"), which has been affirmed by the Board of Immigration Appeals ("BIA"), is entitled to a deferential standard of review under the Supreme Court decision in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

ANALYSIS: The BIA previously ruled that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") provides asylum for victims, or their spouses, of coercive family planning policies. *Id*. at 186. The BIA, however, affirmed the decisions of Immigration Judges ("IJ") who denied asylum to the boyfriends and fiancés of victims. *Id*. Before ruling on the facts, the 2nd Circuit discussed whether those decisions should be afforded deference. It ruled that the decisions should not because "were we to accord *Chevron* deference to non-binding IJ statutory interpretations, we could find ourselves in the impossible position of having to uphold as reasonable on Tuesday one construction that is completely antithetical to another construction we had affirmed as reasonable the Monday before." *Id*. at 190.

CONCLUSION: "There is no reason to believe that an IJ's summarily affirmed decision contains the sort of authoritative and considered statutory construction that *Chevron* deference was designed to honor." *Id*. at 191.

***Wilson v. McGinnis*, 413 F.3d 196 (2d Cir. 2005)**

QUESTION: "[W]hether, prior to entering a guilty plea, a state defendant must be informed that his sentence in state custody must be served consecutively to, rather than concurrently with, a previously imposed undischarged state sentence." *Id.* at 198.

ANALYSIS: Wilson, a convicted felon, pled guilty to a charge of attempted robbery in the second degree and was told by the court "that he faced a term of 12 years to life." *Id.* at 197. Later, Wilson moved to withdraw his plea. He argued that his plea was not voluntary and

intelligent because he was not informed that the sentence may run consecutive to a prior conviction until after he entered his plea. *Id*. Federal circuit courts have previously held that "federal courts need not warn defendants prior to the entry of a plea that their federal sentences may run consecutively to their state sentences." *Id.* at 199. The court reasoned that Wilson was informed at his plea "that the court intended to sentence him to a prison term of 12 years to life, and that is precisely the sentence that the court imposed." *Id.* at 200. Additionally, the sentencing court retained "discretion to impose a concurrent sentence if it determine[d] that such a sentence would be 'in the interest of justice,'" but chose instead to implement consecutive sentences. *Id.* The court found "that the prevailing rule that imposition of a federal sentence to run consecutively to a state sentence is a collateral consequence of a plea [that] may reasonably be extended to apply to imposition of consecutive state sentences." *Id.*

CONCLUSION: The 2nd Circuit held that "the state court's failure to inform Wilson at the time he pled guilty that he could receive a consecutive sentence did not unreasonably apply the general principle of Supreme Court law that a plea must be knowing, intelligent and voluntary to be valid." *Id.* at 200.

***United States v. Rowe*, 414 F.3d 271 (2d Cir. 2005)**

QUESTION: "[W]hat a proper venue is for an 18 U.S.C. § 2251(c) prosecution." *Id.* at 277.

ANALYSIS: The defendant appealed from a conviction "of advertising to receive, exchange or distribute child pornography in violation of 18 U.S.C. § 2251(c) (now designated § 2251(d))." *Id.* at 272. In "determining the suitability of a particular venue, [a court] 'must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts.'" *Id.* at 278. The court found that the defendant's acts "consist[] of distinct parts which have different localities [that] may be tried where any part can be proved to have been done." *Id.* at 278. Although the defendant posted to a chat room from his home in Kentucky, because the posting was seen by an investigator in New York, the 2nd Circuit found that the defendant's conduct "nevertheless amounted to a continuing offense committed in New York." *Id.* at 279.

CONCLUSION: The 2nd Circuit held that "'venue is proper, both under the Constitution and under the Federal Rules of Criminal Procedure, in any district in which such offense was begun, continued or

completed.'" Therefore, in this case, the Southern District of New York was a proper venue. *Id.* at 274.

THIRD CIRCUIT

Morris v. Rumsfeld, 420 F.3d 287 (3d Cir. 2005)

QUESTION: "[W]hether, when pursuing an employment discrimination claim in federal court, a federal employee may elect to enforce only the liability determination of an EEOC ruling, while seeking a *de novo* jury trial on the question of damages." *Id*. at 289-90.

ANALYSIS: The plaintiff's suit was founded on 42 U.S.C. § 200-e-16(c) which has been interpreted by the courts as requiring a trial *de novo*. *Id*. at 292 (citing *Chandler v. Roudebush*, 425 U.S. 840 (1976). The court looked to other circuit, which held that while administrative finds are admissible as evidence, they are not binding on the district courts. *Id*. at 293.

CONCLUSION: "We hold that, when a federal employee comes to court to challenge, in whole or in part, the administrative disposition of his or her discrimination claims, the court must consider those claims *de novo,* and is not bound by the results of the administrative process, whether that process culminated in one administrative decision, or in two or more decisions." *Id*. at 294.

Yang v. Tsui, 416 F.3d 199 (3d Cir. 2005)

QUESTION: "[W]hether a District Court should abstain from a Hague Convention Petition when a state court custody proceeding is pending." *Id.* at 202.

ANALYSIS: "It is clear that if the state proceeding is one in which the petitioner has raised, litigated and been given a ruling on the Hague Convention claims, any subsequent ruling by the federal court on these same issues would constitute interference. It seems equally clear that, if the state court in a custody proceeding does not have a Hague Convention claim before it, an adjudication of such a claim by the federal court would not constitute interference." *Id.* at 203.

CONCLUSION: The court found that "it is consistent with this purpose that it is the custody determination, not the Hague Convention Petition, that should be held in abeyance if proceedings are going forward in both state and federal courts." *Id.*

***United States v. Pojilenko*, 416 F.3d 243 (3d Cir. 2005)**

QUESTION: "[W]hether a co-conspirator's reasonably foreseeable use of a minor can be attributed to other members of a conspiracy for purposes of applying an enhancement under §3B1.4." *Id*. at 248.

ANALYSIS: Pojilenko, a member of a criminal organization, and a sixteen-year-old accomplice conspired to rob drug users during an arranged drug transaction. *Id*. at 245. Pojilenko was sentenced pursuant to the U.S. Sentencing Guidelines § 3B1.4, applying the two-level enhancement for use of a minor in the crime. *Id*. The Government argued that *Pinkerton* conspiracy principles allowed Pojilenko's sentence to stand, but the 3rd Circuit disagreed, holding that "§ 3B1.4 'specifie[s]' that 'use of a minor' enhancements be individualized, and thus not based on the acts of co-conspirators." *Id*. at 248.

CONCLUSION: The *Pinkerton* principles of co-conspiracy should not be applied in the context of "use of a minor" in crimes for determining the proper sentence. *Id*. at 249.

***Johnson v. Gonzales*, 416 F.3d 205 (3d Cir. 2005)**

QUESTION: Whether an alien who prevailed on his petition for asylum, but whose case was remanded to the Board of Immigration Appeals ("BIA"), which has the authority to reverse that ruling, is considered a "prevailing party" for the purposes of obtaining attorneys' fees. *Id*. at 208.

ANALYSIS: Johnson, the petitioner for asylum, a Liberian native who was forced to serve in the National Patriotic Front of Liberia before deserting, petitioned for asylum. *Id*. at 207. The BIA denied his petition, saying that Johnson had "failed to show that he was persecuted on account of his political opinion." *Id*. On appeal the 3rd Circuit disagreed and held that the BIA's decision was "not supported by substantial evidence" and remanded the case. *Id*. Johnson then moved for attorneys' fees for the appeal and the 3rd Circuit decided that under the Supreme Court's decision in *Schaefer*, Johnson "secured the setting aside of an erroneous BIA decision," and was therefore entitled to attorneys' fees. *Id*. at 209.

CONCLUSION: "[A]n alien whose petition for review of a BIA decision is granted by our Court and whose case is then remanded to the BIA is a prevailing party under the EAJA, and may therefore be entitled to attorneys' fees." *Id*. at 210.

In re *Joubert*, 411 F.3d 452 (3d Cir. 2005)

QUESTION: Whether contested fees "first disclosed in the interim between confirmation and discharge," thereby invoking § 506(b) rather than § 524, allows for a private right of action. *Id*. at 455.

ANALYSIS: "Typically, challenges to creditor collection efforts occur post-discharge, and thus arise under 11 U.S.C. § 524, which governs the effect of bankruptcy discharges. . . . Under § 524(a)(2), a discharge operates as an injunction against a broad array of creditor efforts to collect debts as personal liabilities of the discharged debtor." *Id.* at 455-56. The court found § 524 case law in this and other circuits persuasive and thus, applicable to § 506(b) claims. The court explained that it saw "no reason why the rule should be different for actions asserted under § 506(b) rather than § 524. The essence of the complaint is the same regardless of when the alleged violation was disclosed . . . ." *Id.* at 456.

CONCLUSION: The court concluded "that the decisions holding that § 105(a) does not authorize separate lawsuits as a remedy for bankruptcy violations, though established in the § 524 context, are equally applicable when the underlying complaint is grounded in § 506(b)." *Id.*

In re *Thompson*, 418 F.3d 362 (3d Cir. 2005)

QUESTION: "[W]hether a restitution order from a state criminal prosecution for theft by deception, which directs payment to the fraud victim, is exempt from a Chapter 7 bankruptcy discharge . . . ." *Id.* at 363.

ANALYSIS: Thompson was convicted for fraudulently procuring money for construction contracts, pled guilty to a lesser charge, and was ultimately sentenced to 5 years probation and ordered to pay restitution to his victims. *Id.* at 364. During the pendency of his criminal case he was given a discharge under Chapter 7 of the Bankruptcy code. *Id.* at 363. Thompson claimed that his bankruptcy discharge wiped away his restitution obligations, but the 3rd Circuit disagreed with his contentions. *Id.* at 364. Instead, the court determined that the principles of federalism and congressional intent governed the case of state-mandated restitution. *Id*. at 367-68. History and tradition regarding the application of the bankruptcy laws led the 3rd Circuit to conclude that congressional silence on the matter "dictates that we not interfere with New Jersey's criminal restitution order." *Id.* at 368.

CONCLUSION: If state law provides for criminal restitution, such debts are not dischargeable under Chapter 7 of the Bankruptcy Code.

***Paripovic v. Gonzales*, 418 F.3d 240 (3d Cir. 2005)**

QUESTION: What factors should be considered in determining where a refugee applicant has "last habitually resided," for purposes of 8 U.S.C. § 1101(a)(42). *Id.* at 241.

ANALYSIS: Plaintiff, an ethnic Serb living in Croatia was denied refugee status at his deportation proceedings by an immigration judge. *Id.* at 242-43. The judge issued a deportation order listing Serbia first, then Croatia, as plaintiff's deportation countries. *Id.* at 243. Plaintiff claimed that he was a "stateless" refugee who had resided in Croatia but now has nowhere safe to return. *Id.* at 244-45. On review, the 3rd Circuit noted that although the Immigration and Naturalization Act did not define the term "last habitually resided," it was appropriate for the immigration judge to consider the amount of time the plaintiff spent in Serbia when determining his last habitual residence. *Id.* at 245. The court's ruling hinged upon the Immigration and Nationalization Act, that defines "residence" as "the place of general abode . . . without regard to *intent*." *Id*. (emphasis added).

CONCLUSION: To determine a last habitual residence under the Immigration and Naturalization Act, a court may look to established residences, as well as permanent and semi-permanent places where one lived, but should not look to the intent of the refugee status applicant. *Id.*

***Virgin Islands v. Fahie*, 419 F.3d 249 (3d Cir. 2005)**

QUESTION: Whether "dismissal with prejudice is an appropriate remedy for a violation of *Brady v. Maryland*." *Id.* at 250.

ANALYSIS: The Supreme Court held in *Brady* that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. at 251 n.1 (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The 3rd Circuit found instructive *United States v. Morrison*, which "expressed a preference for suppression of evidence or retrial as a more appropriate remedy for a pre-trial constitutional violation." *Id*. at 253 (citing 449 U.S. 361 (1981)). The 3rd Circuit noted that no circuits have upheld a dismissal with prejudice for a *Brady* violation. *Id.* at 254 n.6. As a result, the court ruled that dismissal with prejudice might be appropriate only where there was deliberate misconduct on the part of the prosecution. *Id.* at 254-55.

CONCLUSION: Absent deliberate misconduct, dismissal with prejudice is an inappropriate remedy for a violation of *Brady v. Maryland*. *Id*. at 259.

FOURTH CIRCUIT

United States v. Taylor, 414 F.3d 528 (4th Cir. 2005)

QUESTION: Whether "a criminal defendant [has] a federal constitutional right to effective assistance of counsel with regard to a post-conviction, post-direct appeal motion for reduction of sentence made by the government pursuant to Federal Rule of Criminal Procedure 35(b)." *Id*. at 530.

ANALYSIS: The court found that the Sixth Amendment does not guarantee a defendant a right to counsel in this situation. *Id*. at 535. The court explained that although the Sixth Amendment provides a right to counsel on direct appeals to which the defendant is entitled as a matter of right, such protections do not extend to direct discretionary appeals. *Id*. at 536. The court reasoned that "because a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when the government makes a motion which can only benefit him by reducing his already final sentence." *Id*.

CONCLUSION: The court held that "neither the Constitution's equal protection guarantees nor due process guarantees provide criminal defendants a right to effective assistance of counsel with respect to a motion by the government pursuant to Rule 35(b)." *Id*.

United States v. Ebersole, 411 F.3d 517 (4th Cir. 2005)

QUESTION: "[Whether] venue on a false claim charge may be proper in a district into which the victimized government agency had passed the subject claim after its initial presentation to that agency (either by the defendant or an intermediary)." *Id*. at 530.

ANALYSIS: Ebersole, the president and director of a business that dealt with the federal government, challenged the district court's holding that venue was appropriate "in any district into which the victimized federal agency passed the [false] claim, in the normal course of its business, following the [false] claim's initial presentation to that agency." *Id*. at 528. The 4th Circuit, building on its decision in *United States v. Bleeker*, 657 F.2d 629 (4th Cir. 1981), reasoned that false claims may constitute continuing offenses for the purpose of establishing venue. *Id*. at 531. In addition, the court noted that the mere presentation of a false claim to the government could amount to an offense. *See id*. at

531. Multiple presentations of false claims could establish venue in many different districts. *Id*. at 530. "As nothing in *Blecker* compels a contrary conclusion, it is of no significance that the false claims there were presented directly to the targeted federal agency just once (by the intermediary), and that Ebersole's false claims were presented directly to the agencies multiple times (as they passed the claims internally in the course of processing them for payment)." *Id*. at 531.

CONCLUSION: The 4th Circuit concluded that a false claim charge is proper in a district into which the victimized government agency has passed the subject claim after its initial presentation to that agency. *Id*. at 531.

***United Sates v. Lemaster*, 403 F.3d 216 (4th Cir. 2005)**

QUESTION: "[W]hether a defendant may . . . waive his right to attack his conviction and sentence collaterally." *Id*. at 220

ANALYSIS: The 4th Circuit cited, without analysis, to those circuits which hold that "the right to attack a sentence collaterally may be waived as long as the waiver is knowing and voluntary" and declined "to distinguish the enforceability of a waiver of direct-appeal rights from a waiver of collateral-attack rights in [a] plea agreement." *Id*.

CONCLUSION: The 4th Circuit found that a "criminal defendant may waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and voluntary." *Id*.

***Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243 (4th Cir. 2005)**

QUESTION: Whether a state law permitting jails to collect a $1.00 per day fee from inmates' accounts to defray the cost of housing those inmates is in violation of the "due process liberty right to be free from punishment before conviction." *Id*. at 246.

ANALYSIS: The 4th Circuit began by noting that "[a]lthough detainees have a right to be free from punishment, clearly 'not every inconvenience encountered during pretrial detention amounts to punishment in the constitutional sense.'" *Id*. at 250. The court enunciated a two-part standard by which it could be determined whether an action by a jail constitutes a punishment. *Id*. at 251. First, the determination would need to be made that the fee amounted to a disability. Second, if such a finding were made, the court would next need to consider whether the action was taken with the express intent to punish; or, if there was no such express intent "whether 'an alternative purpose to which [the act] may rationally be connected is assignable for it' and the action does not

appear 'excessive in relation to the alternative purpose assigned.'" *Id*. at 251 (citations omitted). The 4th Circuit noted that it did not need to address the question of whether the fee amounted to a disability because the second part of the inquiry was not established in this case. *Id*. at 251-51. The court found that the fee demonstrated no express intent to punish, and was also supported by the legitimate government purpose of defraying the cost of providing for prisoners. *Id*. at 252.

CONCLUSION: The 4th Circuit held that a state law allowing jails to assess a $1.00 a day fee to pretrial detainees' accounts is not unconstitutional as a punishment before conviction *Id*.

FIFTH CIRCUIT

United States v. Winbush, 407 F.3d 703 (5th Cir. 2005)

QUESTION: "Whether a Louisiana conviction of the inchoate crime of attempted possession of cocaine with intent to distribute can be construed as a 'serious drug offense,' as defined under § 924(e).3." *Id.* at 705.

ANALYSIS: The 5th Circuit turned to its sister courts, which hold that inchoate crimes may constitute serious drug offenses, even where they are not specifically listed in the statutory language. *Id.* at 707. In a case the 5th Circuit found partially persuasive, *United States v, King*, the 2nd Circuit court placed importance on the statutory language "involving serious drug offense[s]." *Id.* (citing 325 F.3d 110, 113-14 (2d Cir. 2003), (emphasis added)). The *King* court took an expansive view of the word 'involving,' stating that it "'must be read as including more than merely the crimes of distribution, manufacturing, and importation themselves.'" *Id.* (citing *King*, 325 F.3d at 113). The 5th Circuit adopted the holding in *King*, finding that the inchoate crime of attempted possession with intent to distribute to qualify as a serious crime under § 924(e). *Id*.

CONCLUSION: The 5th Circuit concluded that inchoate crimes qualify as serious drug offenses under § 924(e) since the term "involving" should be read expansively to include crimes not specifically listed in the statutory language. *Id*.

In re *Reed*, 405 F.3d 338 (5th Cir. 2005)

QUESTION: "[W]hether § 726(a)(5) entitles a trustee to interest on his compensation and reimbursement award, and if so, at what point such interest begins to accrue." *Id.* at 340.

ANALYSIS: Answering this question in the negative, the 5th Circuit noted it was interpreting the section to conform with Congress's intent. *Id*. at 340. As such, "[d]isallowing trustees to recover under § 726(a) [did] not leave them without a means to ultimately receive the monies they are due [because] the fees and expenses sought by trustees in bankruptcy proceedings are clearly allowed under § 503(b)(2), with payment authorized by § 503(a)." *Id.* at 343.

CONCLUSION: The 5th Circuit held that § 726(a)(5) precluded the recovery of interest on reimbursement awards. *Id.*

***Praylor v. Tex. Dept. of Criminal Justice*, 423 F.3d 524 (5th Cir. 2005)**

QUESTION: Whether the Eighth Amendment requires prison facilities to "provide hormone treatment to transsexual inmates . . . ." *Id.* at 525.

ANALYSIS: With little discussion, the 5th Circuit determined that it "will follow those circuits that have determined transsexualism to be a serious medical need raising Eighth Amendment considerations." *Id.* at 525. Cabining this declaration, the court noted that "while some method of treatment of inmate transsexuals is required, such inmates do not have a constitutional right to hormone therapy. Rather, the prison facility must afford the transsexual inmate some form of treatment based upon the specific circumstances of each case." *Id.* at 525-6.

CONCLUSION: The 5th Circuit held that transsexualism in prison inmates may raise Eighth Amendment considerations, but the extent of treatment required turns on the specific circumstances of the inmate. *Id*.

***White Buffalo Ventures, L.L.C v. Univ. of Tex. at Austin*, 420 F.3d 366 (5th Cir. 2005)**

QUESTION: Whether the Controlling the Assault of Non-Solicited Pornography and Marketings Act of 2003 (CAN-SPAM) preempts state actors' ability to block spam emails. *Id*. at 371.

ANALYSIS: White Buffalo sent thousands of unsolicited e-mails to University of Texas (UT) students. *Id*. at 369. When the university blocked them, White Buffalo claimed that CAN-SPAM's preemption clause prevented UT from blocking the emails because the university was a state actor. *Id*. at 371. The 5th Circuit disagreed, finding there to be "two competing interpretations" of CAN-SPAM's preemptive power. *Id*. at 372.

CONCLUSION: The 5th Circuit concluded that because there is no clear interpretation of CAN-SPAM's preemption clause, the court "must not infer preemption" and UT can block spam emails. *Id*. at 372.

***Long v. Gonzales*, 420 F.3d 516 (5th Cir. 2005)**

QUESTION: "Whether an alien's appeal [to the Board of Immigration Appeals ("BIA")] is withdrawn under § 3.4 by virtue of the alien's 'involuntary or unknowing departure from the United States.'" *Id.* at 518.

ANALYSIS: The 5th Circuit conducted a de novo review of the BIA's conclusion that the involuntary departure of the alien from the United States resulted in the withdrawal of the alien's appeal under 8 C.F.R. § 1003.4. *Id*. at 519. The court considered the reasonableness of the BIA interpretations of the immigration regulations and whether the factual findings of the BIA were supported by substantial evidence. *Id.* at 519. The court concluded that the alien's actions were consistent with 8 C.F.R. § 1003.4 and noted that § 1003.4 on its face, "does not distinguish between [involuntary and voluntary.]" *Id.* at 520.

CONCLUSION: The 5th Circuit ultimately found that withdrawal of appeal pursuant to 8 C.F.R. § 1003.4, can occur where an alien has voluntarily or involuntarily departed from the United States. *Id*.

***McClaren v. Morrison Mgmt. Specialists*, 420 F.3d 457 (5th Cir. 2005)**

QUESTION: Whether plaintiff, in light of supporting statements made in connection with an application for social security disability benefits, is judicially estopped from making a prima facie case of age discrimination. *Id.* at 461.

ANALYSIS: The Supreme Court addressed this question in *Cleveland v. Policy Mgmt. Corp.*, 526 U.S. 795 (1999), and held that although social security disability and Americans with Disabilities Act ("ADA") claims seem incompatible, the two claims can be reconciled and applied to a single individual where the individual can sufficiently explain the inconsistency. *Id.* at 463. The 5th Circuit agreed with the Supreme Court's rationale in *Cleveland* and applied it to this case. *Id.*

CONCLUSION: The 5th Circuit held that where a plaintiff's statements on his social security disability application made prior to his not being selected for the assistant director position contained descriptions of his pains, injuries, and health conditions, plaintiff was estopped from claiming age discrimination under the ADA. *Id.* at 464. The plaintiff claimed that the company's decision not to give him the

assistant director position compelled him to elect to have debilitating spinal surgery and but for the company's decision he would have chosen a less intrusive treatment. The court concluded that the plaintiff's claim was insufficient to explain his statements on his disability application. *Id.*

SIXTH CIRCUIT

Sutton v. St. Jude Med. S.C., Inc., 419 F.3d 568 (6th Cir. 2005)

QUESTION: Whether "increased risk allegedly serious enough to require current medical monitoring qualified as injury in fact, conferring standing." *Id*. at 568.

ANALYSIS: The court reviewed case law from other circuits that held that a condition, which enhances the risk of future injury and thus requiring medical monitoring, constitutes injury in fact. *Id*. at 571-74. Adopting this position, the court held that if facts are alleged which "suggest an increased risk of future harm" there is an injury in fact, and, thus, standing. *Id*. at 574.

CONCLUSION: An increased risk of serious injury which requires medical monitoring constitutes an injury in fact. *Id*.

Rittenhouse v. Eisen, 404 F.3d 395 (6th Cir. 2005)

QUESTION: "[W]hether pre-petition attorney fees are dischargeable in bankruptcy . . . ." *Id.* at 396.

ANALYSIS: The court stated that "11 U.S.C. § 727(b) provides that a discharge under Chapter 7 relieves a debtor of all debts incurred prior to the filing of a petition for bankruptcy, except those nineteen categories of debts specifically enumerated in 11 U.S.C. § 523(a). A debt for pre-petition legal services is not one of the non-dischargeable debts enumerated in § 523(a)." *Id*. The court noted that 11 U.S.C. § 329 would not be rendered meaningless because pre-petition attorney fees were held to be dischargeable. *Id.* at 397. The court reasoned that § 329 does in fact add to Chapter 7 proceedings. *Id.* For example, the court noted, § 329 covers post-petition attorney fees. *Id.*

CONCLUSION: In applying the clear language of the Bankruptcy Code, the court held that pre-petition attorney fees are dischargeable. *Id.* at 396.

***Golden v. Gorno Bros., Inc*, 410 F.3d 879 (6th Cir. 2005)**

QUESTION: Issue before the court was how to calculate the amount in controversy, required for federal jurisdiction, under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301. *Id*. at 882.

ANALYSIS: The court looked to the 3rd and 7th Circuits for guidance in this matter. The 7th Circuit has applied a distinct formula to cases concerning defective vehicles: the cost of a replacement vehicle minus the present value of the defective vehicle is further reduced by the value one obtains from his or her use of that vehicle. *Id*. at 883 (citing *Schimmer v. Jaguar Cars, Inc.*, 384 F.3d 402, 406 (7th Cir. 2004)). Furthermore, because the Act provides that the amount in controversy does not include interest, a finance contract should not determine federal jurisdiction. *Id*. at 883-84.

CONCLUSION: Thus, the 6th Circuit concluded that "finance charges of a contract should not be added when determining if the amount in controversy has been satisfied." *Id*. at 885. Thus, the proper formula is determined by subtracting the present value of a defective vehicle from the cost of a replacement vehicle. *Id*.

***United States v. Cole*, 418 F.3d 592 (6th Cir. 2005)**

QUESTION: "[W]hether a state conviction for being a minor in possession of alcohol is 'countable' under § 4A1.2(c) of the United States Sentencing Guidelines ('the Guidelines') for purposes of calculating a federal defendant's criminal history score." *Id.* at 593.

ANALYSIS: Defendant had been convicted of possession with the intent to distribute the drug Ecstasy and at sentencing, the trial judge used his convictions as a minor to increase his sentence. *Id.* at 593-94. The court discussed the factors taken by other circuits, including the "multi-factor" approach taken by the 5th Circuit, the "elements" approach of the 3rd Circuit, the "essential characteristics" approach of the 10th Circuit, and a blended approach of the 9th Circuit. *Id.* at 595-97. In using the 10th Circuit's "essential characteristics" test, the court explained that the proper evaluation should be to "consider the similarity between the "essential characteristics" of the activity underlying the offense of prior conviction and those underlying the listed offense." *Id.* at 598. As a result of this balancing test, the court overturned the application of defendant's prior criminal offenses which were committed when he was a minor. *Id.* at 600.

CONCLUSION: The "essential characteristics" balancing test is appropriate to determine if an offense committed when one was a

juvenile can be used as a sentencing factor under the Guidelines. *Id*. at 598.

Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685 (6th Cir. 2005)

QUESTION: "Is a motion for attorney fees under [Federal Rule of Civil Procedure] 54(d)(2)(B) timely if filed within fourteen days of the district court's denial of a timely filed Rule 59(e) motion?" *Id.* at 687.

ANALYSIS: The 6th Circuit looked to the meaning of the word "judgment" as used in FRCP 54 to determine when the tolling began and whether or not a final judgment is required after a dismissal of a FRCP 59(e) motion. *Id.* at 688. "The disposition of the Rule 59(e) motions is an order or ruling that reinstates the finality of the original entry of judgment and a ruling that makes the underlying judgment appealable." *Id*. The court aligned itself with similar holdings from the 2nd and 11th circuits and attempted to clarify the inefficiency and confusion created by the federal rule. *Id*. at 689-691.

CONCLUSION: "We hold that because a timely filed Rule 59(e) motion destroys the finality of judgment, a motion for attorney fees filed pursuant to Federal Rule of Civil Procedure 54(d)(2)(B) is timely if filed within fourteen days of the order disposing of the Rule 59(e) motion." *Id*. at 691.

In re *Lott*, 139 F. App'x 658 (6th Cir. 2005)

QUESTION: Whether a defendant's "assertion of actual innocence effect[s] a waiver of the attorney-client and work product privileges." *Id*. at 660.

ANALYSIS: The 6th Circuit reviewed the district court's decision to execute a discovery order for attorney-client and work product privilege material because defendant had asserted himself innocent of murder during a habeas proceeding. *Id*. at 659. The district court had determined as a matter of first impression that defendant's claim of innocence would act as an implied waiver to discussions with attorneys and the state should have access to any statements made by defendant as to his innocence of guilt. *Id.* The court reasoned that implied waivers have been narrowly interpreted and have only applied to attorney privilege where the conduct of the attorney is questioned. *Id*. at 660. The court pointed to the lack of any authority supporting the district court's finding of an implied waiver. *Id*. at 661.

CONCLUSION: The 6th Circuit found that due to the error in the district court's ruling that the defendant "shall not be required to waive the attorney-client privilege or the work product privilege." *Id*. at 663.

***United States v. Palcios-Suarez*, 418 F.3d 692 (6th Cir. 2005)**

QUESTION: "Whether a state-felony drug conviction, which would not be a felony under federal law, could nevertheless constitute an 'aggravated felony' as defined in 8 U.S.C. § 1101(a)(43)(B)." *Id.* at 694.

ANALYSIS: The defendant appealed the district court's sentence imposed upon him after he pleaded guilty to "illegally reentering the United States after having been previously removed." *Id*. at 694. The sentence rendered was enhanced because of the defendant's two prior drug convictions. *Id*. The defendant based his appeal on two issues. The first, and most important, issue raised by the defendant is that the district court committed a reversible error by concluding that his sentence should be enhanced because of his prior state-law felony convictions, which the court considered to be "aggravated felonies." *Id.* The 6th Circuit agreed with the defendant in that the previous two drug convictions were not "aggravated felonies." *Id*.

CONCLUSION: The court held that the defendant's two prior cocaine convictions did not constitute "aggravated felonies" and did not authorize the sentencing enhancement found in the Immigration & Nationality Act. *Id.* at 694.

***United States v. Bernal-Aveja*, 414 F.3d 625 (6th Cir. 2005)**

QUESTION: "Whether a burglary of a dwelling charge in an indictment is sufficient to prove, without more, that a guilty plea to a lesser included burglary offense constitutes 'a crime of violence' under the [United States Sentencing] Guidelines." *Id.* at 627.

ANALYSIS: The defendant pled guilty to illegally reentering the United States and was sentenced by the district court to fifty-seven months in prison. *Id*. at 626. The district court ruled that the defendant's prior conviction for burglary was a "crime of violence" and enhanced the defendant's sentence. *Id*. The defendant appealed the district court's decision that the prior burglary conviction was a "crime of violence." *Id*.

The 6th Circuit stated that "'a crime of violence' includes 'burglary of a dwelling'" and that the government holds the burden of proof in demonstrating that the defendant's previous conviction was a "crime of violence." *Id*. Since the defendant's prior guilty plea did not specify what

type of structure was burglarized, the court cannot presume that the defendant committed "burglary of a dwelling." *Id.* at 627-628.

CONCLUSION: The court concluded that the burglary of a dwelling charge "was insufficient" in proving that the defendant's guilty plea to a "lesser included burglary offense" constituted a crime of violence that justified the use of the sentencing enhancement. *Id*. at 628.

***Lukowski v. CSX Transp., Inc.*, 416 F.3d 478 (6th Cir. 2005)**

QUESTION: "Whether a plaintiff who is within the 'zone of danger' may recover damages under FELA [Federal Employer's Liability Act] for emotional distress suffered not as a result of fear for personal physical safety, but rather, as a result of witnessing a third party's peril." *Id.* at 482.

ANALYSIS: The court's analysis began by stating that "in order to recover emotional distress damages under FELA, a plaintiff must demonstrate that he or she was within the 'zone of danger' of physical impact." *Id*. FELA "refers simply to 'injury,' which may encompass both physical and emotional injury." *Id.* Therefore, the court decided that "the common law 'zone of danger' test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.*

CONCLUSION: The 6th Circuit ruled that the phrase "emotional injury caused by physical injury to himself" limits the recovery for emotional distress to "damages suffered as a result of a fear for one's own physical safety." *Id*. at 483. The court concluded that the plaintiff's emotional distress injuries that did not arise out of fear for his own personal safety were not recoverable damages under FELA. *Id.* at 478.

***United States v. Hargrove*, 416 F.3d 486 (6th Cir. 2005)**

QUESTION: Whether a "defendant's prior convictions for violating [the] Ohio statute criminalizing sexual conduct with [a] stepchild" qualify as "violent felonies" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924. *Id.* at 486.

ANALYSIS: The court stated that ACCA defines violent felonies as including crimes that "have as an element the use, attempted use, or threatened use of physical force against the person or another or crimes that involve conduct that presents a serious potential risk of physical injury to another." *Id.* at 494. The 6th Circuit then used a "categorical approach," which was "limited to an examination of the fact of

conviction and the statutory definition of the predicate offense." *Id*. This result forces the "trial court to look only to the fact of conviction and the statutory definition of the prior offense." *Id*. Here, the Ohio statute in question "does not distinguish between consensual sex and forced sex, or between sex with a minor and sex with an adult." *Id.* at 496. Since the Ohio statute and the defendant's indictment failed to make this distinction, this situation "does not present a serious potential risk of physical injury to another." *Id*.

CONCLUSION: The defendant's prior felony convictions under the "Ohio statute criminalizing sexual conduct with [a] stepchild" do not constitute violent felonies under the ACCA. *Id*. Therefore, the sentence should not have been enhanced.

SEVENTH CIRCUIT

Ioffe v. Skokie Motor Sales, Inc., 414 F.3d 708 (7th Cir. 2005)

QUESTION: "[W]hether the Odometer Act [49 U.S.C. § 32701 et.seq.] creates a private right of action based on a violation of 49 C.F.R. § 580.5(c) where the transferor's fraudulent intent is unrelated to a vehicle's odometer or mileage." *Id.* at 710.

ANALYSIS: The plaintiff proposed a broad interpretation of the statute so that "a plaintiff has a private right of action under § 32710 if there has been a violation of the Odometer Act or any of its implementing regulations and the violator intended to defraud the plaintiff." *Id.* at 711. The 7th Circuit rejected the plaintiff's claim and looked to the plain meaning of the statute and Congress's intent in drafting the statute. The court concluded that "the private right of action covers prohibited acts that are committed with fraudulent intent and excludes cases where some fraudulent act happens to coincide with a violation of a regulation but the violative act is done for reasons other than to perpetrate a fraud." *Id.* at 712.

CONCLUSION: The 7th Circuit held that "[t]he Odometer Act creates a private right of action for violations of 49 C.F.R. § 580.5(c) only where a transferor chose not to disclose a vehicle's mileage to the transferee in writing on the title with intent to defraud as to the vehicle's mileage." *Id.* at 715.

***Bintz v. Bertrand*, 403 F.3d 859 (7th Cir. 2005)**

QUESTION: Whether *Crawford v. Washington*, 541 U.S. 36 (2004), should be applied retroactively. *Id.* at 865.

ANALYSIS: "As a general matter, we look at the Supreme Court's holdings as of the time of the relevant state court decision to determine clearly established federal law. The Supreme Court prohibits analyzing the reasonableness of a state court determination in light of a 'new' Supreme Court rule propounded after the state court made its decision." *Id.* at 865. Therefore, the court analyzed whether *Crawford* announced a new rule. *Id.* In discussing the issue the court stated, "[i]t seems clear that *Crawford* was a clean break from the line of precedent established by *Roberts*. *Crawford* considered and rejected the continuing application of *Roberts*. Nevertheless, a state court would not have acted unreasonably by failing to anticipate this ruling and applying *Roberts*. *Crawford* was thus a new rule for purposes of *Teague*." *Id.* at 866-67. Lastly, the court noted that neither of the two exceptions to the *Teague* rule applied to the present case. *Id.* at 867.

CONCLUSION: "*Crawford*, therefore, is not a watershed change for purposes of the second *Teague* exception and does not apply retroactively." *Id.* 867.

***McCready v. White*, 417 F.3d 700 (7th Cir. 2005)**

QUESTION: Whether people who wanted information under 18 U.S.C.S. § 2721(b) had a private right of action. *Id.* at 702.

ANALYSIS: "The statute authorizes private suits, but only by persons whose information has been disclosed improperly. § 2724(a)." *Id.* at 703. The court noted that 42 U.S.C.S. § 1983 "provides a remedy only for the violation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States. 'Rights' differ from 'broader or vaguer benefits or interests' that some statutes create." *Id.*

CONCLUSION: "Because McCready is no different from any other member of the public, so far as § 2721(b) is concerned, he can't use § 1983 to supply the private right of action missing from § 2724(a)." *Id.* at 703-04.

***United States v. Turcotte*, 405 F.3d 515 (7th Cir. 2005)**

QUESTION: Whether substances which are "not officially scheduled as controlled substances themselves [under the Controlled Substances

Act, 21 U.S.C. § 802] may be regulated as such if they meet the definition of a 'controlled substance analogue.'" *Id*. at 521.

ANALYSIS: This was an issue of statutory construction, revolving on the placement of the word "or" between the second and third clauses of the statute. *Id*. Because the court found there to be a lack of clarity in the statute, it looked to several other circuits who had interpreted the conjunctive reading. This interpretation was based "largely on the absurd results that might obtain under a disjunctive reading, noting that alcohol and caffeine could be criminalized as controlled substance analogues based solely on the fact that, in concentrated form, they might have depressant or stimulant effects similar to illegal drugs." *Id*. at 522-23. Additionally, the legislative history shows that "the Act was intended primarily to prevent scientists from slightly modifying the chemical structure of banned drugs to create new 'designer drugs' that would have similar physiological effects but would not be covered by the law's controlled substances schedules." *Id*. at 523.

CONCLUSION: The other circuits' common-sense based, practical interpretation leads to the ultimate conclusion that the conjunctive reading is appropriate. *Id*.

***United States v. Deutsch*, 403 F.3d 915 (7th Cir. 2005)**

QUESTION: "Whether a district court may impose consecutive prison terms upon revoking concurrent terms of supervised release." *Id*. at 916.

ANALYSIS: Other circuits, including the 8th Circuit, have clearly rejected the argument that a district court can impose a sentence of no longer than five years following a revocation of supervised release. *Id*. at 917. Title 18, section 3624(e) of the U.S. Code relied on by the prisoner in this appeal, "simply explains when a term of supervised release begins to run and clarifies that it runs concurrently with other terms of supervised release or parole." *Id*. 917. Finally, the statutory guidelines "limit only the length of each term, not the length of overall punishment; therefore, when each individual term is lawful – as here – it may be stacked consecutively with other lawfully imposed terms." *Id*.

CONCLUSION: A district court can exercise its own "discretion to impose consecutive prison terms upon revoking concurrent terms of supervised release." *Id*. at 918.

In re *UAL Corp.*, 408 F.3d 847 (7th Cir. 2005)

QUESTION: Whether the term "'interested party,' as used in the section of the Bankruptcy Code governing rejection of [collective bargaining agreements] CBAs," should it be interpreted as synonymous with "party in interest" *Id*.

ANALYSIS: The 7th Circuit first stated that "[a]lthough the Bankruptcy Code does not define the term 'interested party,' . . . it is most naturally read to mean 'party to the collective bargaining agreement' or a guarantor of the contract." *Id*. at 851. The court then stated that if the term 'interested party' were treated as a synonym of 'party in interest,' then it would include "any person with a financial stake in the employer's performance of the collective bargaining agreement." *Id*.

CONCLUSION: The court ruled that "interested party" was not synonymous with "party in interest" and that an "interested party" in this instance was a party to the agreement or a guarantor of that agreement. *Id*. The court's rationale was based on a fear that to do otherwise would run the risk of making such proceedings unmanageable. *Id*.

***United States v. Von Loh*, 417 F.3d 710 (7th Cir. 2005)**

QUESTION: Whether separate instances of rape that involve the same victim can be considered separate counts for sentencing purposes. *Id*. at 712-13.

ANALYSIS: On multiple occasions, defendant statutorily raped a fourteen-year-old girl he met online. *Id*. at 712. He was convicted based on one encounter but had admitted to others; the district court chose not to group the offenses in sentencing him. *Id*. Defendant argued that all the encounters occurred in one "relationship" and involved substantially the same harm, and thus should be considered one count. *Id*. The 7th Circuit disagreed and held, consistent with other circuits, that "counts should be grouped [only] when they involve substantially the same harm and when 'one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." *Id*. at 714. Since the defendant's conduct did not fit into that category, his counts were separable. *Id*.

CONCLUSION: Repetition of conduct in multiple acts of one crime does not constitute one count of that crime. *Id*. at 714.

EIGHTH CIRCUIT

United States v. Carruth, 418 F.3d 900 (8th Cir. 2005)

QUESTION: Whether defendant's Sixth Amendment rights to a trial by jury is violated under *Blakely v. Washington* and *Apprendi v. New Jersey*, because the amount of restitution ordered was "beyond the prescribed statutory maximum [and thus] must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 903.

ANALYSIS: Defendant was convicted of fraud in a counterfeit scheme and sentenced to pay restitution under the Mandatory Victims Restitution Act ("MVRA"). *Id.* at 902. Under the MVRA, restitution claims were provable by a preponderance of the evidence, unlike criminal prosecutions subject to a reasonable doubt standard. *Id.* The court noted that all other circuits deciding this issue had held that restitution orders were not affected by *Blakely* and *Apprendi*, and did not "prohibit judicial fact finding for restitution orders." *Id.* at 904. Because the MVRA did not provide any maximum limits for restitution, and because *Blakely* "dealt with determinate sentencing rather than a restitution statute without a set maximum limit," the court found no constitutional objection to MVRA. *Id.*

CONCLUSION: The MVRA restitution orders, given by a judge and under a preponderance of the evidence standard, are not in violation of *Apprendi v. New Jersey* or *Blakely v. Washington*, which require any fact that increases penalty for a crime beyond prescribed statutory maximum to be submitted to jury and proved beyond a reasonable doubt. *Id*.

Throneberry v. McGehee Desha County Hosp., 403 F.3d 972 (8th Cir. 2005)

QUESTION: "[W]hether the FMLA [Family and Medical Leave Act of 1993] imposes strict liability for all interferences with FMLA rights, or whether the FMLA condones lawful interference with FMLA rights." *Id*. at 977.

ANALYSIS: When an employee properly makes use of her FMLA benefits, specifically leave time, she "does not have unlimited restoration rights upon returning from leave." *Id*. at 978. Essentially, what the FMLA does provide is "leave with an expectation an employee will return to work after the leave ends." *Id*. Furthermore, "if an employer were authorized to discharge an employee if the employee were not on FMLA leave, the FMLA does not shield an employee on FMLA leave from the same, lawful discharge." *Id*. This notion comports with the plain

language and structure of the statute, the Department of Labor's understanding of the FMLA, as well as the 10th Circuit. *Id*. at 978-79.

CONCLUSION: The court held that "an employer who interferes with an employee's FMLA rights will not be liable if the employer can prove it would have made the same decision had the employee not exercised the employee's FMLA rights" *Id*. at 977.

***United States v. Martin*, 408 F.3d 1089 (8th Cir. 2005)**

QUESTION: "Whether the doctrine of equitable tolling is available to … a [28 U.S.C.] § 2255 movant." *Id.* at 1092.

ANALYSIS: Provided in occurs within the one-year statute of limitations, 28 U.S.C. § 2255 allows for a motion to be brought to "vacate, set aside, or correct [a] sentence." *Id.* at 1090. The 8th Circuit cited with approval a 9th Circuit decision, *United States v. Battles*, 362 F.3d 1195 (9th Cir. 2004), which compared the motion brought pursuant to § 2255 with a habeas corpus petition brought under 28 U.S.C. § 2254. *Martin*, 408 F.3d at 1092. The 9th Circuit stated that both statutes "have the same operative language and the same purpose." *Id*. (citing *Battles*, 262 F.3d at 1196). Therefore, the 9th Circuit failed to see any reason "to distinguish between them in this regard." *Id*. at 1092 (citing *U.S. v. Battles*, 262 F.3d at 1196). The 8th Circuit, following the 9th Circuit's rationale joined the 2nd, 5th, 6th, 7th, 10th, and 11th Circuits in finding that equitable tolling applies to § 2255. *Id*.

CONCLUSION: Ultimately, the 8th Circuit found that the doctrine of equitable tolling applies to a § 2255 movant. *Id*. at 1092.

***United States v. Frazier*, 408 F.3d 1102 (8th Cir. 2005)**

QUESTION: "Whether the use of [a defendant's] post-arrest, pre-*Miranda* silence during the government's case-in-chief [is] constitutional." *Id*. at 1109.

ANALYSIS: Although the 8th Circuit noted that in various other situations use of a defendant's silence as a sign of guilt violates the defendant's rights, the court found that use of a defendant's silence post-arrest, pre-Miranda does not violate any of the defendant's rights. *Id*. at 1110. The Court found that the main issue is whether the defendant was "under [an] 'official compulsion to speak.'" *Id*. If the defendant was under such a compulsion, then the silence is inadmissible; however, if there was not official compulsion to speak, then it can be used. *Id*. The 8th Circuit then found that arrest alone does not constitute "official compulsion to speak." *Id*. at 1111.

CONCLUSION: Use of a defendant's post-arrest, pre-Miranda silence during the government's case-in-chief is constitutional as long as the defendant was not under an "official compulsion to speak," which arrest alone does not constitute.

***Prudential Ins. Co. of Am. v. Nat'l Park Med. Cent., Inc.*, 413 F.3d 897 (8th Cir. 2005)**

QUESTION: "Whether Erika's civil enforcement provision completely preempts the civil penalties provision of the Arkansas [Patient Protection Act] PPA, Ark. Code Ann. § 23-99-207." *Id.* at 907.

ANALYSIS: Analyzing this question under the recent Supreme Court decision in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), the court looked to the legislative scheme behind ERISA as well as the Arkansas PPA statute to decide whether the PPA statute conflicted the exclusive ERISA remedy. *Id*. at 914. The PPA civil penalty provision allowed participants to bring suit where their plan denied reimbursement for services from a provider. *Id*. This provision was expressly preempted by ERISA where the federal statute provided for a similar remedy. *Id*.

CONCLUSION: The court ultimately held that "ERISA completely preempts the civil penalties provision of the Arkansas PPA as applied to suits that could have been brought under ERISA § 502." *Id*. at 908.

NINTH CIRCUIT

***Bailey v. County of Riverside*, 414 F.3d 1023 (9th Cir. 2005)**

QUESTION: "Whether the [14 day] Rule 54(d)(2)(B) time limit is tolled pending the outcome of post-trial motions under Rule 50 or Rule 59." *Id.* at 1025.

ANALYSIS: "The other circuits to reach this question have held that the requirement that the motion for attorneys' fees 'must be filed no later than 14 days after entry of judgment' is tolled pending the outcome of post-trial motions under Rule 50 or Rule 59." *Id.* (citations omitted). "[T]hose motions operate to suspend the finality of the district court's judgment." *Id.* "A 'judgment' for purposes of the Federal Rules of Civil Procedure includes a decree or order 'from which an appeal lies.'" *Id.* (citations omitted). "The judgment was not appealable during the pendency of the post trial motions in this case." *Id.*

CONCLUSION: The court concluded held that "[t]he Rule 54(d)(2)(B) motion for fees is timely if filed no later than 14 days after the resolution of a Rule 50(b), Rule 52(b), or Rule 59 motion." *Id.*

***Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005)**

QUESTION: Whether a conviction of an alien for sexual battery in California constitutes an aggravated felony rendering that alien removable from the country under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(iii). *Id*. at 930-31.

ANALYSIS: Lisbey pled guilty to sexual battery in California, which proscribes the use of physical force to perform an act for sexual gratification, arousal or abuse. *Id*. at 931 (citing CAL. PENAL CODE § 243.4(a)). Under the INA, an alien is deportable if convicted of an aggravated felony, which includes a "crime of violence" in its definition *Id*. To be considered a crime of violence, the crime must include a "'substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'" *Id*. at 932. Decisions by the Supreme Court, as well as other circuits, held that sexual crimes were crimes of violence. *Id*. at 932-33 (citing *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *United States v. Wood*, 52 F.3d 272, 276 (9th Cir. 1995); *Zaidi v. Ashcroft*, 374 F.3d 357, 361 (5th Cir. 2004); *Sutherland v. Reno*, 228 F.3d 171, 176-77 (2d Cir. 2000); *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993).

CONCLUSION: A conviction for sexual battery in California constitutes an aggravated felony, rendering an alien convicted of that crime removable pursuant to INA § 237(a)(2)(A)(iii).

***Hawthorne Sav. F.S.B. v. Reliance Ins. Co. of Ill.*, 421 F.3d 835 (9th Cir. 2005)**

QUESTION: Whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq. "bars the federal diversity statute, 28 U.S.C. § 1332, from preempting or otherwise interfering with Pennsylvania's rehabilitation and liquidation statutes." *Id*. at 842.

ANALYSIS: The McCarran-Ferguson Act "provides that '[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.'" *Id*. The defendant argued that federal jurisdiction impaired "the operation of Pennsylvania's

state-law liquidation regime." *Id*. The court disagreed and, relying on *Gross v. Weingarten*, 217 F.3d 208 (4th Cir. 2000), held that § 1332 did not dispossess Pennsylvania of jurisdiction over the liquidation and disposition of assets. *Hawthorne*, 421 F.3d at 842.

CONCLUSION: 28 U.S.C. § 1332 is not pre-empted by the McCarran-Ferguson Act. *Id*. at 844.

***United States v. Cervantes-Flores*, 421 F.3d 825 (9th Cir. 2005)**

QUESTION: Whether the admission of a "certificate of nonexistence of record" ("CNR") violates the defendant's Sixth Amendment Confrontation Clause rights in light of *Crawford v. Washington*, 541 U.S. 36 (2004). *Cervantes-Flores*, 421 F.3d at 828.

ANALYSIS: Under *Crawford*, non-testimonial evidence is not subject to the Confrontation Clause, and common law exceptions to hearsay typically encompass non-testimonial evidence. *Id*. at 832. The district court had approved the use of the CNR under the business records exception to hearsay. *Id*. at 833. The court, finding that records are regularly kept by the Immigration and Naturalization Service, found that those records constitute business records. Thus, an affidavit concerning those records properly fell within the scope of the business records exemption, making the CNR non-testimonial evidence which is not barred by *Crawford*. *Id*. at 833-34.

CONCLUSION: The admission of a CNR, in which an Immigration and Naturalization Service ("INS") stated there was no evidence in INS records that alien had received permission for admission into the United States, does not violate an alien's Confrontation Clause rights. *Id*. at 828.

***United States v. Carter*, 421 F.3d 909 (9th Cir. 2005)**

QUESTION: What is the meaning of the phrase "altered or obliterated" as used in United States Sentencing Guidelines § 2K2.1(b)(4)? *Id*. at 910.

ANALYSIS: Noting that no court has ruled on the question, the 9th Cir. looked at the plain language of the statute. *Id*. at 911. The court rejected the requirement put forth by the defendant that the serial number of a gun must be untraceable by microscopy. *Id*. Because "altered or obliterated" is phrased in the disjunctive, and because the word "altered" can be defined as "to change or make different," a change which makes the serial number unobservable to the naked eye suffices for U.S.S.G. § 2K2.1(b)(4). *Id*. at 912-13. The court found that neither the structural

context nor the legislative history dictated an alternative result. *Id*. at 913-14.

CONCLUSION: The court held that "for the purposes of Guideline § 2K2.1(b)(4), a firearm's serial number is 'altered or obliterated' when it is materially changed in a way that makes accurate information less accessible." *Id*. at 910. The court further held that, "under that standard, a serial number which is not discernable to the unaided eye, but which remains detectable via microscopy, is altered or obliterated." *Id*.

***United States v. Weiland*, 420 F.3d 1062 (9th Cir. 2005)**

QUESTION: "Whether, for [FED. R. CRIM. P.] 41 purposes, a deputation as a Special Deputy U.S. Marshal confers 'federal law enforcement officer' status on a state law enforcement official." *Id*. at 1070.

ANALYSIS: "Statutes and regulations give the Marshals authority to deputize local law enforcement officials to 'perform the functions of Deputy U.S. Marshals'" *Id*. U.S. Marshals have long had the authority to "seek and execute federal search warrants." *Id*.

CONCLUSION: The court held that a "state law enforcement officer's deputation as a Special Deputy U.S. Marshal made him a "federal law enforcement officer," for purposes of [FED. R. CRIM. P. 41] governing who may request federal search warrants." *Id*.

***Hudson v. Craven*, 403 F.3d 691 (9th Cir. 2005)**

QUESTION: In a civil rights case, what is "the appropriate test of benchmarking [a] hybrid right," one which "involves both speech and associational rights under the First Amendment?" *Id.* at 693.

ANALYSIS: Here, the court looked to what other circuits have done in similar hybrid cases. *Id.* at 696-98. First, the court noted the 2nd Circuit applied the *Pickering* test to a case where a teacher was terminated when it was discovered that he belonged to a certain association. *Id.* at 696. Second, the court stated that both the 7th and 11th Circuits have reasoned that the *Pickering*/*Connick* analysis "does not adequately protect associational claims." *Id.* 697-98. Therefore, the court stated "[b]earing in mind the Supreme Court's seminal public employee speech cases and their application in cases from the other circuits, we conclude that *Pickering* should be applied in this hybrid rights case. The speech and associational rights at issue here are so intertwined that we see no reason to distinguish this hybrid circumstance from a case involving only speech rights." *Id.* at 698.

CONCLUSION: "We conclude that this case should be evaluated under the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), and that under *Pickering*, the college's legitimate safety and pedagogical concerns outweighed the instructor's rights." *Id.* 693.

***Posnanski v. Gibney*, 421 F.3d 977 (9th Cir. 2005)**

QUESTION: Whether the 9th Circuit "[m]ay . . . review the decision of a district court outside [its] circuit to transfer a case into [its] circuit" *Id.* at 978.

ANALYSIS: The 9th Circuit first rejected petitioner's contention that precedent suggested that such review was permissible, as neither case "actually dealt with a 'transferor court . . . not within [the 9th] circuit . . . ." *Id.* at 979. The court then discussed the position adopted by seven of its sister circuits, who "have all held that a transferee circuit does not have jurisdiction to review a transfer court order by a transferor in another circuit." *Id.*

CONCLUSION: The 9th Circuit ultimately joined its sister circuits, holding that a 28 U.S.C. § 1404 transfer is not subject to review "by a district court outside of [its] circuit to a district court within [its] circuit." *Id.* at 980.

In re *Crown Vantage, Inc.*, 421 F.3d 963 (9th Cir. 2005)

QUESTION: "[W]hether, and to what extent, a bankruptcy court-appointed trustee of a liquidating trust may be sued in a foreign jurisdiction without permission of the court appointing the trustee." *Id.* at 970.

ANALYSIS: The 9th Circuit first turned to the *Barton* doctrine, "established by the Supreme Court over a century ago, which provides that, before suit can be brought against a court-appointed receiver, 'leave of the court by which he was appointed must be obtained.'" *Id.* at 970-71 (citing *Barton v. Barbour*, 104 U.S. 126, 127 (1881)). The court found the doctrine to apply in bankruptcy because "'[t]he trustee in bankruptcy is a statutory successor to the equity receiver,' and '[j]ust like the equity receiver, a trustee in bankruptcy is working in effect for the court that appointed or approved him, administering property that has come under the court's control by virtue of the Bankruptcy Code.'" *Id.* at 971. Joining its sister circuits, the court held that "a party must first obtain leave of the bankruptcy court before it initiates an action in another forum against a bankruptcy trustee or other officer appointed by the

bankruptcy court for acts done in the officer's official capacity." *Id.* at 970.

CONCLUSION: "The requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought either in bankruptcy court or with leave of the bankruptcy court." *Id.* at 971.

***Bassidji v. Goe*, 413 F.3d 928 (9th Cir. 2005)**

QUESTION: "[W]hether an American citizen's guarantees of payments that furthered a trade agreement with an Iranian company are covered by . . . Executive Order [13,059 § 2(d)] and, if so, whether the guarantees are unenforceable as a result." *Id*. at 930.

ANALYSIS: The 9th Circuit interpreted the Executive Order as it would a statute; therefore, the analysis commenced with an examination of the text. After applying the express language of the Executive Order to the facts presented, the court reviewed the district court's holding that such guarantee agreements could facilitate trade between Iran and Hong Kong by a U.S. citizen.

CONCLUSION: The court held "that the guarantees were illegal under the Executive Order and, under the circumstances of this case, unenforceable." *Id*. at 930.

***Huftile v. Miccio-Fonseca*, 410 F.3d 1136 (9th Cir. 2005)**

QUESTION: "[Whether] the favorable termination rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), appl[ies] to civil commitments under California's Sexually Violent Predators Act [SVPA]" *Id*. at 1137.

ANALYSIS: The court first determined whether *Heck*'s reference to "prisoners" only applied to convicted criminals. "*Heck*'s favorable termination rule was intended to prevent a person in custody from using [42 U.S.C. § 1983] to circumvent the more stringent requirements for habeas corpus." *Id*. at 1139. Since detainees under statutes such as SVPA may use a habeas petition to challenge the terms of their confinement, the court reasoned that *Heck* must apply to those SVPA detainees with access to habeas relief.

CONCLUSION: The 4th Circuit, affirming the district court's dismissal, "conclude[d] that the *Heck* rule applies" to such commitments. *Id*. at 1137.

***Reynolds v. Hartford Fin. Servs. Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005)**

QUESTION: "Does [the Fair Credit Reporting Act's] adverse action notice requirement apply to the rate first charged in an initial policy of insurance?" *Id.* at 1100.

ANALYSIS: Congress mandated that once consumers possess their credit reports, they will be able to make corrections to and check for any errors. *Id.* at 1107. The court noted that "[t]his increases the chances that a consumer's financial stability will not be hampered by faulty credit information." *Id.* at 1107-08. The 9th Circuit also found that informing individuals of bad credit scores can serve to help them learn of the benefits of higher credit ratings and how to accomplish those ends. *Id.* at 1108. The court stressed that initial insurance policies, policies that economically unsophisticated individuals are likely to purchase, must be protected otherwise the Act would be of little consequence. *Id.*

CONCLUSION: "The Act requires that an insurance company send the consumer an adverse action notice whenever a higher rate is charged because of credit information it obtains, regardless of whether the rate is contained in an initial policy or an extension or renewal of a policy and regardless of whether the company has previously charged the consumer a lower rate." *Id.* at 1100. [see also 2005 WL 2714503]

***United States v. Dupas*, 419 F.3d 916 (9th Cir. 2005)**

QUESTION: Whether "the retroactivity principles of the Fifth Amendment's Due Process Clause preclude the retroactive application of the remedial holding of *United States v. Booker*, which excised portions of Title 18 of the United States Code in order to make the Sentencing Guidelines effectively advisory." *Id.* at 918.

ANALYSIS: The court recognized that "in *Booker*, the Supreme Court expressly stated that *both* holdings should be applied to cases on direct review." *Id.* at 920. "And our decision in *Ameline*, under which Sixth Amendment violations can be cured by giving district courts the opportunity to resentence defendants under the now-advisory Guidelines, necessarily implies that appellate courts should apply *both Booker* holdings retroactively." *Id.*

CONCLUSION: The 9th Circuit rejected Defendant's argument and held that he may be resentenced according to the principles set forth in *Booker* and *Ameline*." *Id.* at 918.

***Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 416 F.3d 1025 (9th Cir. 2005)**

QUESTION: "May a private, nonsectarian, commercially operated school, which receives no federal funds, purposefully exclude a student qualified for admission solely because he is not of pure or part aboriginal blood?" *Id.* at 1027.

ANALYSIS: The court reasoned that "a private school's admissions preference cannot be exclusively racial, yet simultaneously subject to the special relationship doctrine. The Court's decision in [*Morton v. Mancari*, 417 U.S. 535 (1974)] took pains to emphasize the nonracial nature of the challenged hiring preference, expressly ruling that the precise classification at issue, which was based on Indian tribal affiliation, was not racial, but, rather, *political* in nature; for this reason, it was subject only to rational basis review." *Id.* at 1047. "The same principle does not apply to the classification employed by the Kamehameha Schools, which Appellees concede to be exclusively racial in nature, design and purpose." *Id.*

CONCLUSION: "[W]e agree with Doe and find that the Schools' admissions policy, which operates in practice as an absolute bar to admission for those of the non-preferred race, constitutes unlawful race discrimination in violation of § 1981." *Id.* at 1027.

***Wells Fargo Bank NA v. Boutris*, 419 F.3d 949 (9th Cir. 2005)**

QUESTION: Whether federal law may preempt contrary state law as applied to operating subsidiaries of national banks.

ANALYSIS: The court looked into whether California's regulations allowing national banks to create and operate subsidiaries was consistent with the federal Bank Act, 12 U.S.C.A § 21 et seq. *Id.* at 958. Secondly, the court considered if California was even allowed to regulate such entities. *Id.* The court noted that all of the other circuit and district courts had determined that federal law trumped state law. *Id.* n.10. As given in the Bank Act, the court found "that a state law is preempted as applied to an operating subsidiary only if it would be preempted as applied to a national bank." *Id*. at 962. "Operating subsidiaries are subject to no less *and* no more governmental regulation, state and federal, than national banks." *Id.*

CONCLUSION: Under the Bank Act, agencies may promulgate regulations providing for the preemption of state banking law in order to regulate operating subsidiaries of national banks. *Id*. at 954.

***Canatella v. California*, 404 F.3d 1106 (9th Cir. 2005)**

QUESTION: Whether an abstention from the *Younger* doctrine trumps the intervention of right doctrine expressed in Rule 24(a)(2) of the Federal Rules of Civil Procedure. *Id*. at 1112.

ANALYSIS: The *Younger* doctrine is a jurisdictional doctrine, and while it "neither provides a basis for nor destroys federal jurisdiction, *Younger* does determine when the federal courts must 'refrain from exercising jurisdiction.'" *Id*. at 1113. On the other hand, Rule 24 is a more discretionary procedural doctrine. *Id*. Furthermore, intervention of right does not alter federal jurisdiction. *Id*. Finally, "[b]ecause Rule 24 cannot extend federal jurisdiction and *Younger* abstention imposes mandatory limits on the federal courts' ability to exercise jurisdiction, [the court held] that intervention as of right cannot be used to circumvent *Younger* abstention." *Id*.

CONCLUSION: A district court is "not required to consider the merits of intervention before disposing of [an] action under *Younger*." *Id*. at 1114.

***Gonzales v. Free Speech Coal.*, 408 F.3d 613 (9th Cir. 2005)**

QUESTION: Whether a group bringing an overbreadth challenge to the Child Pornography Prevention Act ("CPPA") was entitled to receive attorney's fees against the government due to the fact that the "government was not substantially justified in defending the CPPA because 'the constitutional flaw in the CPPA was recognizable from the start.'" *Id*. at 617-18.

ANALYSIS: Under the Equal Access to Justice Act ("EAJA"), a party prevailing against the government is entitled to attorney's fees unless the government demonstrates "'that the position of the United States was substantially justified or that special circumstances make an award unjust.'" *Id*. at 618. Substantial justification means that the dispute at issue is something over which reasonable minds could differ. *Id*. The views of other courts are significant to answering the question of whether reasonable minds could differ, and so is a demonstrated string of losses or successes by the government in arguing its position. *Id*. In this case the 9th Circuit found there was substantial disagreement among the courts of that circuit as well as disagreement among the circuits as to whether the CPPA was unconstitutionally overbroad.

CONCLUSION: The 9th Circuit found such disagreement to be indicative of the fact that reasonable minds could differ over the merit of the government's position, and that the government was therefore justified in defending itself. *Id*. at 619-20. This being the case, a party

prevailing against the government in a challenge to the CPPA would not be entitled to attorney's fees under the EAJA.

***Guzman-Andrade v. Gonzales*, 407 F.3d 1073 (9th Cir. 2005)**

QUESTION: "[D]o aliens denied temporary or permanent resident status by the INS under the [8 U.S.C. § 1255a] legalization program retain the right to judicial review of the denial after the 1996 amendments to IRCA (the Immigration Reform and Control Act) by section 308(g)(2)(B) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)?" *Id*. at 1075.

REFERENTIAL NOTE: (**Please be aware that, at present, the Legalization Appeals Unit (LAU) is now referred to as the Administrative Appeals Unit (AAU), and that the INS has been collapsed into the Department of Homeland Security. Due to the fact that the procedural history of this case implicates the LAU and the INS prior to the dates when such changes were made, they are referred to in their earlier form**). *Id*.

ANALYSIS: IIRIRA preserves judicial review of a § 1255a denial if the denial is in reference to a deportation proceeding but not if it is in reference to an exclusion proceeding. *Id*. at 1077. Because of the temporary resident status of the plaintiff in this case, the 9th Circuit concluded that there was no question that plaintiff "was lawfully within the United States at the time he filed his legalization application, and would therefore have been subject to deportation, rather than exclusion, proceedings prior to IIRIRA." *Id*.

CONCLUSION: The court concluded that it had "jurisdiction under § 1255a(f)(4)(A) to review [plaintiff's] legalization application." *Id*.

***Jack Russell Terrier Network v. Am. Kennel Club*, 407 F.3d 1027 (9th Cir. 2005)**

QUESTION: Whether "a national breed club and registry and several of its regional affiliates [are] capable of conspiring as separate entities under §1 of the Sherman Act" *Id*. at 1034.

ANALYSIS: The 9th Circuit stated that the crucial question in such a case "is whether the entities alleged to have conspired maintain an 'economic unity,' and whether the entities were either actual or potential competitors." *Id*. The court first noted that the "objectives of the [club] and its regional affiliates are 'common, not disparate.'" *Id*. at 1035. The court then went on to say that "the regional affiliates' sole purpose are to be affiliated with the national club and to promote the [club's] breed

standard and philosophy. In no way do the affiliates compete with the club." *Id*.

CONCLUSION: Based on the fact that the club and its affiliates were not separate entities and were not in economic competition, the court ruled that they could not have entered into a conspiracy in violation of the Sherman Act. *Id*. at 1034-35.

***United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005)**

QUESTION: "Whether the Certificate of Appealability ("COA") requirement of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), as specified in 28 U.S.C. § 2253(c)(1), applies to *coram nobis* proceedings." *Id*. at 1009.

ANALYSIS: "'[T]he writ [of *coram nobis*] provides a remedy for those suffering from the lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of fact and egregious legal errors.'" *Id*. at 1009-10. Under § 2253(c)(1), "the grant of a COA [is] necessary in only two kinds of appeals: an appeal from '(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255.'" *Id*. at 1010. The COA requirement serves a gate keeping function for the courts, but the 9th Circuit has noted that such functions are not necessary in "legitimate *coram nobis* cases . . . [because] few defendants who have already completely served their sentences continue to have reasons to challenge their conviction or sentence." *Id*. at 1011.

CONCLUSION: Because *coram nobis* cases are not within the language of § 2255, and because they do not affect the gate keeping function of the AEDPA, the COA requirement is inapplicable. *Id*.

***United States v. Kimbrew*, 406 F.3d 1149 (9th Cir. 2005)**

QUESTION: "[W]hether the sentencing enhancement for being in the business of receiving and selling stolen property can apply to a defendant who sells only property that he himself has obtained by fraud." *Id*. at 1150.

ANALYSIS: "The [Federal Sentencing] Guidelines permit a two-level enhancement '[i]f the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property.'" *Id*. (quoting U.S.S.G. § 2B1.1(b)(4)). "However, nearly every circuit that has addressed the meaning of this enhancement has agreed 'that a thief who sells goods that he himself has stolen is not

in the business of receiving and selling stolen property.'" *Id*. The 9th Circuit agreed with this reading of the enhancement provision, finding that it was meant to apply to fences (those who are in the business of receiving stolen merchandise from thieves) and not to the thieves themselves. *Id*. at 1153-54.

CONCLUSION: Due to the fact that the defendant in this case was himself stealing the goods in question and not merely acting as a fence, the 9th Circuit found that the sentencing enhancement was inapplicable. *Id*.

***Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005)**

QUESTION: "Whether the prerequisites set forth in *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.* [509 U.S. 209 (1993)] for establishing liability in sell-side predatory pricing cases apply in cases where a defendant engages in buy-side predatory bidding by raising the cost of inputs." *Id*. at 1035.

ANALYSIS: The 9th Circuit began its analysis of the issue by explaining that *Brook Group* places a high burden on the plaintiff in a case alleging sell-side predatory pricing. *Id*. at 1036. The plaintiff must prove that "its competitor operated at a loss and was likely to recoup its losses." *Id*. The 9th Circuit explained that the high burden of proof in sell-side predatory pricing is necessary because the lower prices that occur as a result of sell-side predatory pricing are a benefit to the consumer and often foster competition. *Id*. at 1037. The 9th Circuit then explained that there are no real short or long term benefits to consumers in buy-side predatory pricing, therefore, it is not necessary to have such a high burden of proof in buy-side cases. *Id*. at 1037-38.

CONCLUSION: The prerequisites set forth in *Brook Group Ltd. v. Brown & Williamson Tobacco Corp*. for establishing liability in sell-side predatory pricing cases do not apply in cases where a defendant engages in buy-side predatory bidding by raising the cost of inputs because the consumer will likely not benefit from the effects of buy-side predatory bidding. *Id*. at 1038. Therefore, the high burden of proof in *Brook Group* is not needed. *Id*.

***Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005)**

QUESTION: Whether "a child of a parent who was forcibly sterilized is automatically eligible for asylum under 8 U.S.C. § 1101(a)(42)(B)." *Id*. at 1242.

ANALYSIS: In deciding this issue the court looked to a strict reading of the statute, which "does not plainly indicate that such children are deemed eligible." *Id*. at 1245. The 9th Circuit explained that when the language is ambiguous the court should defer to the reasonable conclusion of the Board of Immigration Appeals ("BIA"). *Id*. The court then evaluates the BIA's conclusions that automatic eligibility does not apply to children of sterilized parents because these children are not necessarily persecuted as a result of the sterilization. *Id*. Unlike the spouse of a sterilized person, who is directly effected by the sterilization by not being able to have children with their spouse, the court finds that it is not unreasonable to conclude that children of a sterilized parent are not necessarily automatically persecuted as a result of the sterilization. *Id*.

CONCLUSION: A child of a parent who was forcibly sterilized is not automatically eligible for asylum under 8 U.S.C. § 1101(a)(42)(B). However, the child is still able to bring a claim to show in their particular circumstances that they should be eligible for asylum. *Id*.

***United States v. Camacho*, 413 F.3d 985 (9th Cir. 2005)**

QUESTION: Whether the double jeopardy analysis applies where a defendant has been previously disciplined through sanctions available to federal employer. *Id*.

ANALYSIS: In this case, the government employer imposed sanctions upon the defendant for theft that the court reasoned were similar to sanctions that a private employer would impose. *Id*. at 989. The 9th Circuit stated that "[o]nly when disciplinary sanctions imposed by the government acting in its role as sovereign are the functional equivalent of criminal punishment is the double jeopardy bar implicated." *Id*. at 989 n.9. The court recognized the policy reasons behind barring use of the double jeopardy clause when the government is the employer and recognized the problems inherent in the government's dual nature. *Id*. at 990.

CONCLUSION: The 9th Circuit fell in line with the 2nd, 5th, 6th, 7th, and 11th Circuits in holding that "criminal prosecution for theft …does not violate his Fifth Amendment protection against double jeopardy. The discipline… is the type of discipline any private employer might have imposed on an employee. It did not rely on the government's sovereign power and is thus outside the scope of double jeopardy concerns." *Id*. at 991.

***United States v. Pulliam*, 405 F.3d 782 (9th. Cir. 2005)**

QUESTION: "Whether a defendant may successfully move to suppress evidence found in a car in which he was a passenger where the car and its occupants were legally stopped but unlawfully detained." *Id.* at 792.

ANALYSIS: First, the court looked to vehicular stop caselaw as a framework. *Id*. These cases held that a defendant who is not a bona fide owner of a vehicle may nonetheless contest the legality of his own incarceration and move to suppress evidence that was found in the automobile as the "fruit" of his incarceration. *Id.* The court noted that, but for the officer's illegal detaining of the vehicle and passengers, the officers would not have found the evidence. *Id.* Therefore, the motion to suppress was correctly granted. *Id.* The court clarified that the stop of a vehicle and detention of the passengers can not be considered separate and independent events, but rather, the situation must be looked at as a whole in a "fruits" analysis. *Id.* Therefore, the court reasoned, a legal stop followed by an illegal incarceration must be considered a single, integrated instance and treated identically to an illegal stop in which a defendant can move to suppress the evidence. *Id*. at 793-94. The court also held, for purposes of standing to suppress, that passengers and drivers are considered the same as the owner of the vehicle and all have standing to move to suppress evidence. *Id.* at 795. Finally, the court emphasized the Supreme Court's stance that "the way to ensure protections [against unconstitutional police activity] is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes." *Id*. (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)).

CONCLUSION: The court ultimately held that a passenger of an automobile who is not the owner may successfully move to suppress evidence found in a car where the car and its occupants were legally stopped but unlawfully detained. *Id*.

***Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005)**

QUESTION: "Whether the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, is a grant of authority to the federal courts to invalidate certain state court child custody proceedings that counteracts the *Rooker-Feldman* doctrine." *Id.* at 1044.

ANALYSIS: This case involved a conflict between the State of California's right to terminate parental rights over Indian children and the ICWA, which "ensures the [Indian] tribes a role in adjudicating child custody proceedings involving Indian children domiciled or residing on

the [Indian] reservation." *Id*. at 1039. However, ICWA is limited "where jurisdiction is otherwise vested in the State by *existing Federal law*." *Id*.

First, the 9th Circuit determined that this matter fell "within the traditional boundaries of the *Rooker-Feldman"* doctrine. *Id*. at 1043. The *Rocker-Feldman* doctrine states that "a federal district court is without subject matter jurisdiction to hear an appeal from the judgment of a state court." *Id*. at 1041. However, the court pointed out that Section 1914 of the ICWA states that "any Indian child who is the subject of any action for foster case placement or termination of parental rights under State law, any parent or Indian custodian from whose custody was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any protection of sections 101 [§1911] ,102 [§1912], and 103 [§1913] of this Act." *Id.* at 1044. Nonetheless, ICWA does not confer jurisdiction upon the federal courts. *Id*. at 1045. Thus, the 9th Circuit used 28 U.S.C. § 1331 in combination with the ICWA to establish federal jurisdiction. *Id.* at 1045-47.

Second, the 9th Circuit applied the facts of this case to Section 1914 of the ICWA and determined that the facts fell within the boundaries of the statute. *Id*. at 1048. The court demonstrated that the California law involved here, Public Law 280, is one that is adjudicatory and not regulatory. *Id.* at 1061. Therefore, the California law for custody proceedings fits within the legislative intent of the ICWA. *Id*. at 1064.

CONCLUSION: California's Public Law 280 creates "concurrent jurisdiction over dependency proceedings involving Indian children." *Id*. at 1068. Therefore, ICWA applies and the federal court has jurisdiction in regards to this matter. *Id*.

***San Carlos Apache Tribe v. United States*, 417 F.3d 1091 (9th Cir. 2005)**

QUESTION: "Whether § 106 [of the National Historic Preservation Act ("NHPA"), currently codified at 16 U.S.C. § 470f,] provides a private right of action against the United States . . . ." *Id*. at 1093.

ANALYSIS: The San Carlos Apache Tribe in Arizona sought an injunction against the United States to maintain certain water levels in the San Carlos Reservoir, thus avoiding proceeding against the federal government under the Administrative Procedure Act ("APA"). *Id*. at 1092. Instead, the Tribe contended that a private right of action existed under the NHPA that allowed it to forego proceeding administratively first. *Id*. at 1093. The 9th Circuit noted that it had previously "assumed" without deciding that the NHPA did grant a private right of action. *Id*. at

1094. The court looked to the recent Supreme Court decision of *Alexander v. Sandoval,* 532 U.S. 275 (2001), which held, under a similarly situated Civil Rights statute, that Congress must explicitly grant a private right of action to proceed against the federal government and that no such implication can be inferred. *Id*. at 1094-95. The 9th Circuit reasoned that the APA provides the alternate means by which a private party can ensure that government officials abide by a statute and thus a private right of action is not necessary. *Id*. at 1099.

CONCLUSION: Section 106 of the NHPA does not provide a private right of action against the United States. *Id*.

TENTH CIRCUIT

Ansari v. Qwest Commc'ns Corp., 414 F.3d 1214 (10th Cir. 2005)

QUESTION: "Whether § 4 of the Federal Arbitration Act (FAA) . . . prohibited the Colorado district court from compelling arbitration in Colorado when the parties' contractual agreement designated Washington, D.C. as the arbitration forum." *Id*. at 1215.

ANALYSIS: The court noted that circuit courts are split, taking one of three basic approaches to resolve this issue. *Id*. at 1218. The court explained that the 5th Circuit "has held that a district court may compel arbitration in the district specified in the arbitration agreement, even though that district is outside its own district." *Id*. The court further pointed to a second approach, adopted by the 9th Circuit, allowing "the district court to compel arbitration in its own district and ignore the forum specified in the arbitration clause." *Id*. at 1219. The court ultimately adopted the majority approach holding that "where the parties agreed to arbitrate in a particular forum only a district court in that forum has authority to compel arbitration under § 4." *Id*. at 1219-20. The court found the third approach correct because "any other result renders meaningless the § 4 mandate that arbitration and the order compelling arbitration issue from the same district." *Id*. at 1220.

CONCLUSION: The court "conclude[d] that § 4 did prohibit the district court from compelling arbitration in either Colorado or Washington, D.C." *Id*. at 1215.

***Claymore v. United States*, 415 F.3d 1113 (10th Cir. 2005)**

QUESTION: "[W]hether sovereign immunity bars an award of monetary damages against the government in a Rule 41(e) action when the property cannot be returned." *Id.* at 1118.

ANALYSIS: The 10th Circuit acknowledged that there is a split among the circuits with regard to this question. *Id.* While the 2nd and 9th Circuits have allowed monetary damages in such a situation, the 3rd, 4th, 5th, 8th and 11th Circuits have not allowed damages when the property has been destroyed. *Id*. The 10th Circuit, like a majority of other circuits that have faced the issue held that "because Rule 41(e) does not contain the explicit waiver of sovereign immunity required to authorize monetary relief against the government, [it] deprives a court of jurisdiction to award damages" when the property has been destroyed. *Id.* at 1118-19.

CONCLUSION: The 10th Circuit "agree[d] with the majority of the circuits and conclude[d] [that] sovereign immunity bars monetary relief in a Rule 41(e) proceeding when the government no longer possesses the property." *Id.* at 1120.

***United States v. Stiger*, 413 F.3d 1185 (10th Cir. 2005)**

QUESTION: "[W]hether a jury, after *Apprendi* and *Booker*, must determine the amount and type of drug attributable to individual coconspirators rather than simply attributable to the entire conspiracy." *Id.* at 1193.

ANALYSIS: The 10th Circuit stated that, under *Apprendi*, "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* at 1192 (quoting *Apprendi*, 530 U.S. 466, 490 (2000)). However, *Apprendi* also only sets the "'maximum sentence ([i.e., the] ceiling)' under which each coconspirator's sentence must fall," and "in the conspiracy context, a finding of drug amounts for the conspiracy as a whole sets the maximum sentence that each coconspirator [can] be given." *Id.* at 1192-93. The 10th Circuit reasoned that "the sentence falls within the statutory maximum made applicable by the jury's conspiracy-wide drug quantity determination," and that *Booker* "does not call [the present sentencing] into question." *Id.*

CONCLUSION: The 10th Circuit found that the "the jury is not required to make individualized findings as to each coconspirator because '[t]he sentencing judge's findings do not, because they cannot, have the effect of increasing an individual defendant's exposure beyond

the statutory maximum justified by the jury's guilty verdict.'" *Id.* at 1193.

***San Juan County v. United States*, 420 F.3d 1197 (10th Cir. 2005)**

QUESTION: Whether an intervenor must establish its own Article III standing as a matter of right. *Id*.

ANALYSIS: The 10th Circuit began by noting that "because standing implicates a court's jurisdiction, it requires a court itself to raise and address standing before reaching the merits of the case before it." *Id.* at 1205. "Nevertheless, on many occasions the Supreme Court has noted that an intervenor may not have standing, but has not specifically resolved that issue, so long as another party to the litigation had sufficient standing to assert the claim at issue." *Id.* For the above reasons, the court concluded that a party seeking to intervene under FED. R. CIV. P. 24 "need not establish its own standing, in addition to meeting Rule 24's requirements, before the party can intervene so long as another party with constitutional standing on the same side as the intervenor remains in the case." *Id.* at 1206.

CONCLUSION: "[I]ntervenors do not need to establish their own Article III standing in order to intervene as a matter of right under FED. R. CIV. P. 24(a)(2)." *Id.* at 1205.

***Pritchett v. Office Depot, Inc.*, 420 F.3d 1090 (10th Cir. 2005)**

QUESTION: "[W]hether the removal provisions of the Class Action Fairness Act of 2005 ["CAFA"] . . . apply to pending state court cases that were removed after the effective date of the Act." *Id*. at 1090.

ANALYSIS: The plain language of the statute provides that CAFA applies to civil actions that began on or after the date of CAFA's enactment, February 18, 2005. *Id*. at 1094. The underlying case at bar was commenced in state court on April 2, 2003. *Id*. The 10th Circuit stated that jurisdictional statues "and particularly removal statutes, are to be narrowly construed in light of our constitutional role as limited tribunals." *Id*. at 1094-95. Further, "Congress initially started out with broader language that could have included a number of then-pending lawsuits in state courts. [But b]y excising the House provision, Congress signaled an intent to narrow the removal provisions of the Act to exclude currently pending suits." *Id*. at 1095.

CONCLUSION: The court did "not have jurisdiction over this appeal predicated on the Class Action Fairness Act because this action was commenced prior to the effective date of the Act." *Id*. at 1093-94.

***United States v. Trujillo*, 404 F.3d 1238 (10th Cir. 2005)**

QUESTION: Under the Fourth Amendment, whether an arrest "immediately terminate[s] a search provision in a parole or probation agreement." *Id*. at 1242.

ANALYSIS: The government has a continuing interest in monitoring parolees, in order to prevent recidivism, and this interest is not subsumed by an arrest. *Id*. at 1242-43. The appellant was "incorrect to assert that the government's interests [in crime prevention] evaporated at the moment of his arrest." *Id*. at 1244. Finally, "a proper weighing of the government's interests in effective supervision and prevention of harm against [the appellant's] privacy interests demonstrates that his arrest has little effect on the calculus. Just as before his arrest, this balance weighs in favor of the government . . ." *Id*.

CONCLUSION: In a parole or probation agreement, arrest does not cancel a search provision. *Id*. at 1244.

In re *Alderete*, 412 F.3d 1200 (10th Cir. 2005)

QUESTION: Whether a Bankruptcy Court has "the power to grant a partial discharge of student loan debts even in the absence of an undue hardship." *Id*. at 1207.

ANALYSIS: Bankruptcy Courts derive their equitable powers from § 105(a) of the Bankruptcy Code which grants the power to "carry out the provisions of this title." *Id*. at 1207. The 10th Circuit referred to the decisions of the 6th, 11th, and 9th Circuits to find that partial discharge of debt cannot be granted where the terms of the specific provision have not been met, in this case requiring a showing of undue hardship under § 523(a)(8). *Id.* at 1207.

CONCLUSION: "A bankruptcy court cannot exercise its § 105(a) powers to grant a partial discharge of student loans unless § 523(a)(8) has been satisfied." *Id*. at 1207.

***McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158 (10th Cir. 2005)**

QUESTION: "Whether an interlocutory appeal from the denial of a motion to compel arbitration divests a district court of jurisdiction to proceed on the merits of the underlying claim while the appeal is pending . . . ." *Id*. at 1160.

ANALYSIS: The court turned to the analysis undertaken by the other circuit courts that seem to be divided on the issue of whether to grant a stay pending an appeal from an arbitration dispute. *Id*. at 1160. The 10th Circuit aligned itself with the views of the 11th and 7th Circuits which held that "upon the filing of a non-frivolous § 16(a) appeal, the district court is divested of jurisdiction until the appeal is resolved on the merits." *Id*. The court also reasoned that jurisdiction for frivolous appeals is meant to avoid "potential misuse of interlocutory review." *Id*. at 1162.

CONCLUSION: "[U]pon the filing of a motion to stay litigation pending an appeal from the denial of a motion . . . to compel arbitration, the district court may frustrate any litigant's attempt to exploit the categorical divestiture rule by taking the affirmative step, after a hearing, of certifying the § 16(a) appeal as frivolous or forfeited." *Id*.

United States v. Bradley, 417 F.3d 1107 (10th Cir. 2005)

QUESTION: Whether the district court followed the correct procedure, under the Supreme Court decision in *Sell v. United States*, 539 U.S. 166 (2003), "for involuntary administration of antipsychotic medication to a non-dangerous criminal defendant for the purpose of rendering him competent to stand trial . . ." *Id*. at 1114.

ANALYSIS: On appeal, the 10th Circuit analyzed the factual and legal findings of the district court to determine whether the administration of drugs was medically appropriate. *Id*. at 1114. Bradley argued that the government did not prove it had established no less intrusive treatment for his condition, but the 10th Circuit disagreed and found that no other treatment would "achieve substantially the same results." *Id*. at 1115. The 10th Circuit also determined that the government has important interest in bringing criminals before the courts. *Id*. at 1116.

CONCLUSION: Under *Sell*, a district court can order involuntary medication of a defendant in order to make him competent to stand trial if the court properly applied the factors defined by the Supreme Court. *Id*. at 1117.

ELEVENTH CIRCUIT

Brown v. McFadden, 416 F.3d 1271 (11th Cir. 2005)

QUESTION: Whether, under 18 U.S.C. § 3624(b)(1) (2005), a federal prisoner is entitled to receive credit toward the service of his

sentence, beyond the time served, of "fifty-four days . . . for each year he is sentenced to imprisonment" or whether the credit attaches "for each year [the prisoner] actually serves in prison." *Id*. at 1272. (emphasis in original)

ANALYSIS: The court decided that the district court's determination that § 3624(b)(1) "clearly supports" the interpretation that the fifty-four days of credit attach for each year the prisoner serves in prison "is arguably correct." *Id*. However, the court chose to follow the holdings of the five sister circuits addressing this issue, holding the provision is ambiguous but the interpretation proffered by the district court is a reasonable one. *Id*. at 1273.

CONCLUSION: § 3624(b)(1) entitles a federal prisoner to fifty-four days of credit for each year he serves his prison sentence. *Id.* at 1272.

McNair v. Campbell, 416 F.3d 1291 (11th Cir. 2005)

QUESTION: Whether 28 U.S.C. § 2254(b)(3)(2005) "applies not only to exhaustion, but also to a procedural bar that arises out of a failure to exhaust." *Id*. at 1305.

ANALYSIS: The court explained that a procedural bar arises when the plaintiff does not properly exhaust his state remedies prior to filing a *habeas corpus* petition. *Id*. at 1306. The court noted that § 2254(b)(3) speaks about exhaustion and not about procedural bars, providing that "the [s]tate can waive [the plaintiff's] failure to properly exhaust his claim only by expressly doing so . . . ." *Id*. at 1305. However, the court opined that when a procedural bar occurs because of the plaintiff's failure to exhaust his state remedies, § 2254(b)(3) applies, mandating that the state can waive the procedural bar only if it expressly chooses to. *Id*.

CONCLUSION: Section 2254(b)(3)'s express waiver requirement applies to procedural bars arising from plaintiff's failure to exhaust his state court remedies. *Id*. at 1306.

In re *Martinez*, 416 F.3d 1286 (11th Cir. 2005)

QUESTION: Whether the bankruptcy court properly awarded attorney's fees and costs to a "prevailing [commercial] debtor in a dischargeability action brought by his creditor . . ." *Id*. at 1288.

ANALYSIS: The court pointed out that a prevailing litigant in a federal bankruptcy litigation can only get attorney's fees if a federal statute or a contract provides for such an award. *Id*. Here, the parties' contract provided that it was governed by Florida law. *Id*. The contract further provided that the creditor is entitled to attorney's fees if he brings

suit to enforce the contract. *Id*. The court recognized this provision was one sided and referred to a Florida law providing that such a provision must be construed to afford all parties to the contract a right to collect attorney's fees where they must bring suit to enforce the contract. *Id*. at 1288-89.

CONCLUSION: The court concluded that "a prevailing debtor in a dischargeability action brought by his creditor can recover his attorney's fees and costs incurred in those dischargeability proceedings if recovery of such are due under an enforceable contractual right, such as a statutory reciprocal attorney's fee provision, provided for by state law." *Id*. at 1288.

***Ortega v. U.S. Atty. Gen.*, 416 F.3d 1348 (11th Cir. 2005)**

QUESTION: "[W]hether [the court has] jurisdiction to review an order of the Board of Immigration Appeals that determined the status of an alien under section 202 of the Nicaraguan and Central American Relief Act of 1997." *Id*. at 1349.

ANALYSIS: The court determined that § 202(f) of the Act "clearly shows that Congress intended to foreclose judicial review" of the Attorney General's decision concerning whether an alien has or has not established that "his status should be adjusted under [the Act] . . ." *Id*. at 1350.

CONCLUSION: The court held that, "[b]ecause the clear language of section 202(f) restricts our jurisdiction, we dismiss the appeal for lack of jurisdiction." *Id*. at 1349.

***Williams v. Dist. Bd. of Trs. of Edison Cmty. College*, 421 F.3d 1190 (11th Cir. 2005)**

QUESTION: "[W]hether a Florida community college, under the new education code enacted in January 2003, is an arm of the state, entitled to immunity under the Eleventh Amendment." *Id*. at 1190.

ANALYSIS: To determine whether a community college is an "arm of the state" the court looked at four factors: "(1) how the state defines the entity; (2) what degree of control the state maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgment against the entity." *Id*. at 1192. The court determined that, though a community college is an arm of the state, this did not "weigh heavily in [the] analysis." *Id*. at 1193. The degree of control of the state over the community college did weigh heavily towards the college being an arm of the state, as did the source of funding and the state's status as

judgment debtor for judgments entered against the college. *Id*. at 1193-94.

CONCLUSION: A Florida community college "is an arm of the state for purposes of immunity under the Eleventh Amendment." *Id*. at 1194.

***United States v. Burge*, 407 F.3d 1183 (11th Cir. 2005)**

QUESTION: Whether prior juvenile adjudication may be considered for purposes of increasing appellee's sentence under the Armed Career Criminal Act ("ACCA"). *Id*. at 1188.

ANALYSIS: The court noted that the sentencing factor of recidivism is arguably the most traditional basis for increasing an offender's sentence. *Id.* The court looked at other circuits, the majority of which have held that when a juvenile is convicted and has received all process constitutionally due at the juvenile stage, no constitutional problem exists in using that prior adjudication for purposes of increasing a later sentence. *Id.* at 1189-90. The court next agreed that trial by jury is not a constitutional requisite in juvenile adjudications. *Id.* at 1190. Under this paradigm, the court held that the prior adjudication may be considered for purposes of increasing appellee's sentence under the ACCA. *Id*. at 1191.

CONCLUSION: A juvenile adjudication may be a "prior conviction" under the ACCA where the defendant has been afforded all constitutionally-required process due in the juvenile adjudication.

***United States v. Moreno*, 421 F.3d 1217 (11th Cir. 2005)**

QUESTION: Whether Amendment 591 to the Federal Sentencing Guidelines provides a basis for reduction in sentence via a § 3553(a) motion. *Id.* at 1218-19.

ANALYSIS: Pursuant to a motion under § 3553(a), a court may "reduce the term of imprisonment . . . to the extent [the factors contained in the provision] are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* at 1219 (citing 18 U.S.C. § 3582(c)(2)). "Amendment 591 requires that the initial selection of the offense guideline be based only on the statute or offense of conviction rather than on judicial findings of actual conduct not made by the jury." *Id.* Although the Amendment "directs the [courts] to apply the guideline dictated by the statute of conviction [it] does not constrain the use of judicially found facts to select a base offense level within the relevant guideline." *Id.* at 1219-20. Agreeing with the reasoning of its sister circuits, the 11th Circuit held that Amendment 591

governs only the "selection of the relevant offense guideline, not the selection of a base offense level within the applicable offense guideline . . . ." *Id.* at 1220.

CONCLUSION: The 11th Circuit ultimately concluded that "Amendment 591 only applies to the selection of the relevant offense guideline, not the selection of a base offense level within the applicable offense guideline . . . ." *Id.* at 1220.

***Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005)**

QUESTION: "[W]hether a plaintiff must prove actual damages before he may recover a liquidated damages award under the [Driver's Privacy Protection Act ("DPPA")]." *Id.* at 1212.

ANALYSIS: The relevant sections of the DPPA, 18 U.S.C. §§ 2722 and 2724, make it "unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for [an unpermitted use.]" *Id.* at 1212. Turning first to the statutory text, the court determined that there was "no language in [the provision] that confines liquidated damages to people who suffered actual damages." *Id.* at 1213. Therefore, "[s]ince liquidated damages are an appropriate substitute for the potentially uncertain and unmeasurable actual damages of a privacy violation, it follows that proof of actual damages is not necessary for an award of liquidated damages." *Id.* The 11th Circuit then pointed to dicta where the Supreme Court suggests that "language similar to the language in the DPPA [does not create the] prerequisite [of showing actual damages] to recovering statutory damages." *Id.* at 1214 (citing *Doe v. Chao*, 540 U.S. 614 (2004)). Finally, the 11th Circuit found that the district court's application of the rule of the last antecedent –that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows"—was erroneously applied to the provision at issue. *Id.* at 1215. (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2004)).

CONCLUSION: The 11th Circuit concluded that "[a] plaintiff need not prove actual damages to recover liquidated damages for a violation of the DPPA." *Id.* at 1217.

***D'Angelo v. Conagra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005)**

QUESTION: "Whether the [Americans with Disabilities Act]'s reasonable accommodation requirement applies to the regarded-as category of disabled individuals . . . ." *Id.* at 1235.

ANALYSIS: The 11th Circuit found that because "a review of the plain language of the ADA yields no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense," the court would join the 3rd Circuit in "holding that regarded-as disabled individuals also are entitled to *reasonable accommodations* under the ADA." *Id.* (emphasis in original). Finding that "[t]he text of the statute simply offers no basis for differentiating among the three types of disabilities in determining which are entitled to a reasonable accommodation and which are not" the court concluded that the "ADA's plain language . . . compels [the court] to conclude that the very terms of the statute require employers to provide reasonable accommodations for individuals it regards as disabled." *Id.* at 1236. Thus, "'regarded-as' employees under the ADA are entitled to reasonable accommodation in the same way as those who are actually disabled." *Id.* at 1237.

CONCLUSION: "Based on the text of this statute and the absence of any contrary expression of congressional intent, we hold that an individual falling within the 'regarded as' category of disability under the ADA is entitled to a reasonable accommodation no less than an individual satisfying the actual-impairment definition of disability." *Id.* at 1239.

Coffman v. Chugach Support Servs., Inc., 411 F.3d 1231 (11th Cir. 2005)

QUESTION: "Whether the district court properly determined that the defendant was not liable to the plaintiff as a 'successor in interest' or 'successor employer' and, therefore, owed no duty to reemploy the plaintiff [once he returned from active military duty] under 38 U.S.C. § 4312 (2005) and 38 U.S.C. § 4313 (2005)." *Id*. at 1234.

ANALYSIS: The court began by identifying the definition of "employer" as utilized by the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). *Id.* at 1234. USERRA does not provide a definition for "successor in interest;" thus, the court looked to the legislative history and relevant case law for guidance. *Id.* at 1236. The court gave credence to the factors listed by the 8th Circuit in *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991), but reasoned that they were only necessary when a merger or transfer of assets has taken place between the two subject companies. *Id.* The foundation of successor liability is the "merger or transfer of assets between the predecessor and successor companies." *Id*. at 1237. Because

Del-Jen and the defendant had neither merged nor transferred assets, the defendant did not owe a duty to the plaintiff. *Id.* at 1239.

CONCLUSION: The 11th Circuit ultimately concluded that the district court made the proper determination. *Id.* at 1239. The court held that the defendant was not a "successor in interest' or "successor employer," and therefore USERRA does not apply. *Id*. at 1232.

***United States v. Searcy*, 418 F.3d 1193 (11th Cir. 2005)**

QUESTION: "[W]hether a violation of 18 U.S.C. § 2422(b) should be classified as a crime of violence for the purpose of career offender classification . . . ." *Id*. at 1195.

ANALYSIS: Searcy was convicted of using the internet to induce a minor into engaging in "unlawful sexual activity." *Id*. at 1194. Searcy was classified as a career offender because of his history of violent crimes and claimed that his current conviction was not violent in nature. *Id*. at 1195. The 11th Circuit disagreed and defined a "crime of violence" as either a crime with an element of force, or a crime with the potential risk of injury. *Id*. Because statutory rape "inherently poses a serious potential risk of physical injury," the 11th Circuit affirmed his status. *Id*. at 1196 (quoting *United States v. Smith*, 20 F. App'x. 412 (6th Cir. 2002)).

CONCLUSION: Convictions under § 2422(b) should be considered crimes of violence for sentencing purposes. *Id*. at 1198.

***Johnson v. Meadows*, 418 F.3d 1152 (11th Cir. 2005)**

QUESTION: Whether the Prison Litigation Reform Act's ("PLRA") exhaustion requirement requires simple exhaustion or proper exhaustion of administrative avenues before a prisoner may bring suit in court. *Id*. at 1153-54.

ANALYSIS: Johnson, a Georgia state prisoner, sued his prison in federal court without first following administrative procedure and his suit was dismissed. *Id*. at 1154. Johnson then filed a complaint which was denied for being untimely, and filed again in federal court. *Id*. The prison argued that Johnson's suit was not allowed because he did not truly exhaust his administrative remedies since he did nothing until the federal court ordered it and did not appeal his administrative denial. *Id*. The 11th Circuit agreed and held that the exhaustion provision "mandates strict exhaustion" and that all prisoners must first exhaust all internal remedies before filing in court. *Id*. at 1155. The 11th Circuit further explained that any other decision would allow prisoners to "'evade the exhaustion

requirement by filing no administrative grievance or by intentionally filing an untimely one . . .'" *Id*. at 1157. (citing *Marsh v. Jones*, 53 F.3d 707 (5th Cir. 1995)).

CONCLUSION: The PLRA's exhaustion requirement requires prisoners to fully exhaust all administrative remedies with good faith before being able to file a complaint in court. *Id*. at 1159.

***MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234 (11th Cir. 2005)**

QUESTION: When determining diversity jurisdiction, how does a court determine the "citizenship of a defendant corporation which once operated in the same state as the plaintiff but has since been purchased by and integrated into an out-of-state corporation as a holding company?" *Id.* at 1237.

ANALYSIS: Plaintiff claimed that the court lacked subject matter jurisdiction over the matter because the parties were not in complete diversity with each other at the time the complaint was filed. *Id.* at 1239. Specifically, the defendant was an "inactive corporation" at the time of the suit, and plaintiff claimed that his citizenship remained the same as when the corporation was active. *Id.* at 1239. The court determined that its "total activities test" was appropriate for both active and inactive corporations, and looked at the principal place of business and nerve center to determine where citizenship existed at the time of the suit. *Id.* at 1239. Because defendant was completely inactive in plaintiff's jurisdiction at the time the suit was filed, but did business elsewhere, the court determined that it was not an "inactive corporation" as defined by other circuits. *Id.* at 1240. Thus, the Court observed that defendant's place of business and nerve center were different than that of the plaintiff, and complete diversity did exist. *Id.*

CONCLUSION: The court held that its "total activities test" was the correct test to determine the citizenship of an "inactive corporation." *Id*. at 1234.

***Robertson v. Hecksel*, 420 F.3d 1254 (11th Cir. 2005)**

QUESTION: Whether there is a constitutionally-protected liberty interest in a mother's continued relationship with her adult son, under Fourteenth Amendment substantive due process. *Id.* at 1255.

ANALYSIS: Reviewing plaintiff's § 1983 claim for deprivation of alleged constitutional interests with respect to police causing the death of plaintiff's son, the court noted that it was progressing into a "murky area of unenumerated constitutional rights." *Id.* at 1256 (citing *McCurdy v.*

Dodd, 352 F.3d 820, 825 (3d Cir. 2003)). The 1st, 3rd, 7th, and DC Circuits had rejected similar claims where the "deprivation was incidental to the defendant's actions." *Id.* at 1258. The 10th Circuit, referring to the First Amendment's right of intimate association, had upheld a parent's liberty interest with an adult son. *Id.* at 1258 n.3. Only the 9th Circuit had upheld "allowing a parent to bring a companionship claim in the context of an adult child where the deprivation was incidental to the state action." *Id.* at 1258 n.4. The court rejected plaintiff's claim that she had a constitutionally-protected liberty interest in her relationship with her adult son, finding no Supreme Court precedent and no reason to further expand protections under the Fourteenth Amendment. *Id.* at 1260.

CONCLUSION: The 11th Circuit would not affirm a parent's constitutional right to companionship with an adult son, in the context of a § 1983 claim. *Id.* at 1259. The court concluded it is up to the Florida legislature to determine whether said deprivations are allowable. *Id.* at 1262.

Siemens Power Trans'n. & Distrib., Inc. v. Norfolk So. Ry. Co., 420 F.3d 1243 (11th Cir. 2005)

QUESTION: (1) "[W]hether a shipper's timely compliance with the minimum claim filing requirements in 49 C.F.R. § 1005.2(b), a regulation promulgated by the Interstate Commerce Commission ("ICC"), is a prerequisite to filing suit against a carrier under the Carmack Amendment, 49 U.S.C. § 14706. . . ." *Id.* at 1245. (2) If the timely compliance is a requirement, "what standard should be applied to determine whether a shipper has adhered to the regulation's requirement that a claim contain 'a specified or determinable' amount of damages, 49 C.F.R. § 1005.2(b)." *Id.*

ANALYSIS: The court noted that although it had not "expressly held the ICC minimum claim requirements apply to litigated claims," in contrast with voluntarily settled claims, prior holdings had assumed as much. *Id.* at 1250. In reviewing how other circuits had treated this matter, the court determined that all but one circuit to address the issue had held the requirements to apply to litigated claims. *Id.* The 1st, 2nd, and 9th Circuits had held that the ICC regulations apply to contested and voluntarily settled claims; the 5th and 6th Circuits had applied the ICC regulations without explicitly holding on the issue; and the 7th Circuit had concluded that the ICC regulations only apply to the settled claims. *Id.* After reviewing the precedent from the other courts, the 11th Circuit was persuaded by the majority of circuits that 49 C.F.R. § 1005.2(b) did

govern plaintiff's claim. *Id.* at 1251. The court further determined that an exact damages estimate was not needed for plaintiff, as long as the carrier had enough information to start processing the claim. *Id.* at 1253-54.

CONCLUSION: The 11th Circuit ultimately reversed the district court's decision that the plaintiff did not have a valid claim. *Id.* at 1254. While affirming the holding that § 1005.2(b) applied to both litigated and settled matters, the court disagreed with the lower court's determination that the plaintiff had not provided specified damages. *Id.* The Circuit construed the statute liberally to hold that the plaintiff's claim met the requirements of "specified and determinable" damages because the damage estimates were in a narrow-enough range. *Id.*

Centurion Air Cargo v. United Parcel Serv., 420 F.3d 1146 (11th Cir. 2005)

QUESTION: Whether an arbitrator's order is binding, where the parties have not expressly agreed that said award is binding and where the district court has not yet affirmed the award. *Id.* at 1149.

ANALYSIS: The court observed that the "Supreme Court has declared a strong federal policy in favor of arbitration." *Id.* at 1149. Hence, "[t]o adopt a rule that an arbitral decision is not 'binding' and thus lacks the authority of a conclusive judgment would run counter to this policy and require all winners in arbitrations to seek affirmation in a district court." *Id.* at 1150.

CONCLUSION: "[W]e agree with the Fourth and Fifth Circuits and hold that an arbitrator's order is binding on the parties unless they expressly agree otherwise, and does not require affirmance from a court to take effect." *Id.* at 1150.

Young v. New Process Steel, 419 F.3d 1201 (11th Cir. 2005)

QUESTION: "May a district court require, as a condition for appealing a judgment, that a losing plaintiff in a civil rights case post a Fed. R. App. P. 7 bond that includes the defendant's anticipated appellate attorney's fees?" *Id.* at 1202.

ANALYSIS: The appellate court cited to *Christiansburg v. Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978) for the proposition that a "district court should not award attorney's fees to a prevailing civil rights defendant absent 'a finding that the plaintiff's action was frivolous, unreasonable, or without foundation.'" *Id.* at 1205.

CONCLUSION: "[W]e hold that a district court may not require an unsuccessful plaintiff in a civil rights case to post an appellate bond that includes not only ordinary costs but also the defendant's anticipated attorney's fees on appeal, unless the court determines that the appeal is likely to be frivolous, unreasonable, or without foundation." *Id.* at 1207-08.

***London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005)**

QUESTION: Whether "plaintiffs must show that the unfair, discriminatory or deceptive practice adversely affected competition in order to prevail under the [Packers and Stockyards Act] PSA." *Id*. at 1302.

ANALYSIS: The Court stated that it must "'interpret the words of the statute in light of the purposes Congress sought to serve." *Id*. (quoting *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36 (1983)). The 11th Circuit stated that fair competition and fair trade were the primary purposes of the law and it was enacted out of a fear of a monopoly by packers. *Id*. at 1303. The 11th Circuit cited to the 7th Circuit, which reasoned that there was no evidence that Congress sought to give a more expansive view of the PSA. *Id*. Furthermore, the 11th Circuit found that the holdings in the 4th and 8th Circuits, which state that an "unfair practice" requires an injury or likelihood of injury, to be persuasive. *Id.* In light of that Congressional intent, the Court found, along with the 4th, 7th, and 8th Circuits, that the actions in question must "adversely affect or be likely to adversely affect competition." *Id*.

CONCLUSION: "In order to prevail under the PSA, a plaintiff must show that the defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition." *Id*. at 1304.

***United States v. Phillips*, 413 F.3d 1288 (11th Cir. 2005)**

QUESTION: "[W]hether a prior conviction for the attempted sale of a controlled substance qualifies as a drug trafficking offense under U.S.S.G. § 2L1.2(b)(1)(A)" and whether deportation terminates outstanding parole. *Id*. at 1288.

ANALYSIS: The 11th Circuit looked to the statutory language and commentary of U.S.S.G. § 2L1.2(b)(1)(A) to decide whether the conviction for "attempted sale of a controlled substance" would be considered a drug trafficking offense. *Id*. at 1288. Defendant was given a sixteen-level sentencing enhancement on the theory that his offense was

within the purview of the drug trafficking statute. *Id.* at 1291. The court used the statute's commentary "that an 'attempt offense' can qualify as a prior drug trafficking offense" and compared a similar holding from the 9th Circuit. *Id*. at 1292. As for the issue of whether deportation terminates parole, the court noted the lack of case law supporting the defendant's belief and pointed to the 1st Circuit's rejection of the issue. *Id*. at 1292.

CONCLUSION: A previous conviction for attempted sale of a controlled substance is a drug trafficking offense under U.S.S.G. § 2L1.2(b)(1)(A) and defendant's deportation after his conviction did not terminate his parole. *Id*. at 1288-92.

***Offshore Marine Towing, Inc. v. MR23*, 412 F.3d 1254 (11th Cir. 2005)**

QUESTION: "Whether attorney's fees may be awarded to a salvor in an in rem action for salvage." *Id*. at 1256.

ANALYSIS: The 11th Circuit examined the exceptions for the general rule that attorney's fees are not awarded in admiralty cases. *Id*. The exceptions for an award of fees occur in cases where there was either bad faith, breach of warranty of workmanlike performance, and indemnity situations. *Id.* at 1256. These exceptions were not present in this case and the court evaluated the Blackwall factors that were enumerated by the Supreme Court to determine that attorney's fees were not included as to the value or risk of salving the property. *Id*. at 1257.

CONCLUSION: "Attorney's fees may not be recovered in an in rem action to enforce a salvage lien." *Id.* at 1258.